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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 224.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

EDWARD J. FREEL, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF EDWARD FREEL, DECEASED.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED JANUARY 10, 1901.

(19016).

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a United States circuit court of appeals for the second circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF in error,
vs.
EDWARD J. FREEL, AS EXECUTOR, &C., impleaded, defendant in error.

Transcript of record. Error to the circuit court of the United States for the eastern district of New York.

1 Circuit court of the United States for the eastern district of New York.

THE UNITED STATES OF AMERICA
vs.
JOHN GILLIES, HENRY HAMILTON, AND Hugh McRoberts, Catharine Freel, Edward J. Freel, and Frank J. Freel, as executors of the last will and testament of Edward Freel, deceased.

The plaintiff, the United States of America, by and through George H. Pettit, United States attorney for the eastern district of New York, as and for an amended complaint, respectfully shows to this court and alleges, upon information and belief:

First. That heretofore and on or about the 17th day of November, 1892, the defendant, John Gillies, entered into a contract and agreement with the plaintiff, whereby the said defendant Gillies did agree to construct a timber dry dock, to be located at the United States navy-yard, Brooklyn, New York, according to certain plans and specifications
2 attached to said contract and made a part thereof, as by reference to said contract, hereto annexed, marked "A," and made a part of this complaint, will more fully appear.

Second. That thereafter and on or about the 16th day of June, 1893, pursuant to and in conformity with paragraph "seventh" of said contract, the said John Gillies and the United States agreed in writing to change and modify the said plans and specifications so as to increase the length of said dry dock from six hundred to six hundred and seventy feet, which said latter agreement or writing is hereto annexed, marked "B," and made part of this complaint.

Third. That thereafter and on or about the 17th day of August, 1893, pursuant to and in conformity with paragraph "seventh" of the contract first above mentioned, the said John Gillies and the plaintiff further agreed in writing to change and modify the plans and specifications annexed to the original contract, which said last-mentioned agreement or writing is hereto annexed, marked "C," and made part of this complaint; the amount specified therein for the additional work thus provided having been first ascertained by a commission duly appointed as required by paragraph "seventh" aforesaid of the first-mentioned contract.

Fourth. And the plaintiff further alleges that on or about the 17th day of November, 1892, the defendants, John Gillies, as principal, and

Henry Hamilton and Hugh McRoberts and one Edward Freel, as sureties, executed their certain bond and obligation, whereby they and their heirs, executors, administrators, and assigns, respectively, jointly and severally became held and firmly bound unto the United States of America in the sum of $123,600; the condition of said bond being that,
3 if the said John Gillies "shall well and truly perform the stipulations of the contract of even date herewith * * agreeing to construct one timber dry dock, to be located at the navy-yard, Brooklyn, N. Y., conforming in all respects to said contract and to the plans and specifications attached thereto, and forming a part thereof, then the above obligation to be void and of no effect; otherwise to remain in full force and virtue." That said bond was given in connection with and as security for the performance of the above-mentioned contracts between defendant Gillies and the United States.

Fifth. That the said defendant Gillies entered upon the performance of said contract and agreements and proceeded with the same up to a certain stage, but before the completion of said contract the said contractor did fail and neglect to go forward with the said contract and agreements and the work thereunder, and did fail and neglect to make satisfactory progress toward the completion of said contracts and the work thereunder within the time specified in the said contract and agreements aforesaid, and within a reasonable time thereafter, from causes within his control, as decided by the Chief of the Bureau of Yards and Docks, and did proceed with the said work under said contract and agreements so slowly, negligently, and unsatisfactorily that the Secretary of the Navy, under the option and right reserved to him by the said contract, did declare the said contract forfeited on the part of the said contractor, John Gillies, and the said contractor, John Gillies, was thereupon duly notified of said forfeiture; that immediately thereafter the said Secretary of the Navy appointed a board of competent persons to ascertain and declare a fair market value of all work done and of materials on hand, including a reasonable and customary margin of profit upon the work done satisfactorily, which said board consisted of George C. Remey,
4 Captain, United States Navy; Frank W. Hibbs, assistant naval constructor, United States Navy, and Adolfo J. Menocal, civil engineer, United States Navy; that thereafter the said board made such investigation and appraisal, the said defendant being notified of the sessions thereof and being present in person at the sessions or some of them of said board; that the said board did carefully and diligently examine the work under the said contract done by the said defendant Gillies, and the materials on hand for use in the construction of the same; the said defendant Gillies being given an opportunity by said board to present such evidence as he desired concerning the amount and value of work done by him and the quantity and value of materials on hand, and, after full investigation and careful consideration, the said board did report and find that the fair market value of the work done on the aforementioned dry dock and of the materials on hand for use in the construction of the same, including a reasonable and customary margin of profit upon the work so far as the same had been satisfactorily performed, to be $170,175.40; that said report and findings of the said board were duly approved by the Secretary of the Navy.

Sixth. That thereafter, under the provisions and terms of said contract, the said Secretary of the Navy did proceed to and did complete the said dry dock and appurtenances in accordance with the contracts, plans, and specifications aforesaid, at a cost to the plaintiff, the United States of America, of the sum of $370,000, which sum the said United States of America was compelled to pay for the completion of the work agreed to be performed by the said defendant under the said contract, plans, and specifications aforesaid; that prior to the time when the said contract was declared forfeited the plaintiff had paid to the said defendant Gillies on account thereof the sum of $165,033.34; that by the
5 terms of said agreements between the United States and said defendant Gillies the said defendant Gillies had agreed to perform said work and furnish necessary materials under said contract for the sum of $462,619.18; that by reason of the failure and neglect on the part of the said defendant Gillies to fulfill and perform the terms and conditions of said contract on his part the plaintiff was required to pay the sum of $533,033.34, or $72,414.16 more than the said defendant Gillies, under the said contract, had agreed to perform said work and furnish necessary materials for, which latter sum represents the damages sustained by the plaintiff by reason of the said defendant Gillies' breach of contract as aforesaid.

Seventh. That Edward Freel aforesaid died at the city of Brooklyn on the 24th day of December, 1896, leaving a last will and testament, which was duly admitted to probate by the surrogate of the county of Kings on the 31st day of December, 1896, in and by which he appointed his widow, Catharine Freel, and his sons, Edward J. Freel and Frank J. Freel, executrix and executors of his last will and testament; that all of said persons duly qualified, and letters testamentary were issued to the said defendants, Catharine Freel, Edward J. Freel, and Frank J. Freel, by the said surrogate of the county of Kings, on the 31st day of December, 1896.

Eighth. That the said defendant, John Gillies, neglected and refused to perform the terms and conditions of said contract on his part, in that he failed and neglected to proceed with the said work as before mentioned, and the plaintiff herein has performed, fully and completely, all the terms and conditions of said contract on its part.

Wherefore plaintiff demands judgment against the defendants herein for the sum of seventy-two thousand four hundred and fourteen
6 and 16/100 ($72,414.16) dollars, with interest from April 1st, 1897, together with the costs of this action.

GEORGE H. PETTIT,
United States Attorney for the eastern district of New York.

UNITED STATES OF AMERICA,
Eastern district of New York, ss:

George H. Pettit, being duly sworn, says: That he is the attorney for the United States for the eastern district of New York, and the attorney for the plaintiff in this action; that the allegations contained in the foregoing amended complaint are true to the knowledge of deponent, except as to the matters therein alleged upon information and belief, and as to those matters he believes it to be true; that the grounds of deponent's

belief as to the matters alleged in said complaint on information and belief are information received from the officials of the United States having had connection with the said contract and work, and the original contract, and all papers and correspondence referring to the same.

G. H. PETTIT.

Sworn to before me this 8th day of September, 1898.

RICHARD P. MORLE,
U. S. Commissioner, E. D. of N. Y.

7

A.

Contract for the construction of a timber dry dock to be located at the U. S. Navy-Yard, Brooklyn, N. Y.

This contract of two parts, made and concluded this 17th day of November, A. D. 1892, by and between John Gillies, of the city of Brooklyn, in the State of New York, and hereinafter designated as the contractor, party of the first part, and the United States, represented by Commodore N. H. Farquhar, U. S. Navy, Chief of the Bureau of Yards and Docks, Navy Department, acting under the direction of the Secretary of the Navy, party of the second part;

Whereas, by advertisement, dated May 12, 1892, proposals were invited by the Chief of the Bureau of Yards and Docks, Navy Department, for the construction by contract of a timber dry dock of the general dimensions, and to be located at the place, therein specified; and

Whereas the proposals of the said contractor, dated July 13, 1892, to construct a timber dry dock to be located at the United States Navy-Yard, Brooklyn, N. Y., for the sum of four hundred and twelve thousand dollars ($412,000), has been duly accepted by the Secretary of the Navy.

Now, therefore, this contract witnesseth: That, in consideration of the premises, and for and in consideration of the payments to be made as hereinafter provided for, the party of the first part, for himself, his heirs and assigns, and his personal and legal representatives, does hereby covenant and agree to and with the United States as follows; that is to say:

First. The contractor will, within twenty days after he shall have been tendered the possession and occupancy of the site by the
8 party of the second part, which possession and occupancy of the said site during the period of construction and until the completion and delivery of the work hereinafter mentioned, shall be secured to the contractor by the party of the second part, commence, and within twenty-seven calendar months from such date, construct and complete, ready to receive vessels, a timber dry dock, to be located at such place on the water line of the navy-yard, Brooklyn, N. Y., as shall be designated by the party of the second part; and will, at his own risk and expense, furnish and provide all labor, materials, tools, implements, and appliances of every description, all of which shall be of the best kind and quality adapted for the work as described in the specifications, necessary or requisite in and about the construction of said dry dock and the steel caisson, pumping machinery, pump house, culverts, and all other accessories and appurtenances, in accordance with the aforesaid plans and specifica-

tions, subject to the approval of the civil engineer, or such other competent officer or person or persons as may for that purpose be designated by the party of the second part; it being further mutually agreed and stipulated that the officer or officers, person or persons thus designated shall and may, from time to time during the progress of the work, inspect all materials furnished and all work done under this contract, with full power to reject any material or work, in whole or in part, which he or they may deem unsuitable for the purpose or purposes intended, or not in strict conformity with the spirit and intent of this contract and with the aforesaid plans and specifications, and to cause any inferior or unsafe work to be taken down by and at the expense of the contractor; and that all such rejected material shall be at once removed from the station and replaced by material satisfactory to such inspector, and that all such inferior or unsafe work shall be replaced by satisfactory work, by and
9 at the expense of the contractor. Such inspectors shall at all times during the progress of the work have full access thereto, and the contractor shall furnish them with full facilities for the inspection and superintendence of the same.

It is further mutually stipulated and agreed that at and upon the request of the civil engineer or other officer in charge any disorderly, careless, or incompetent person or persons employed by the contractor in or about the work to be done under this contract shall be at once discharged and not again employed therein; and that all necessary and suitable precautions shall be taken by the contractor during the progress and until the final completion of such work to avoid or prevent accidents; and that the contractor will indemnify and save harmless the party of the second part from all claims against the United States, and from all actions and proceedings at law, and from all costs and damages for or by reason of any injury to person or property resulting from, or directly or indirectly attributable to, any accident or accidents which may occur in or during the prosecution of the work and in connection therewith or any part thereof, or to any carelessness or negligence, wilful or otherwise, of any person or persons employed by the contractor, or to the use of improper or defective materials, or to any act or omission of the contractor prior to the final acceptance of the said dry dock.

Second. The contractor will, at all times during the progress of the work, give his personal supervision and attention to the same and to every part and detail thereof and, in case of his absence, will have a competent representative or foreman present, authorized to act for him in all matters connected with the work and to receive and follow directions relating thereto when given by the civil engineer or other officer in
charge; and for all acts and omissions of such representative or
10 foreman in the premises the contractor shall be responsible.

Third. The contractor will, from time to time, as the same may accumulate during the progress of the work, remove all refuse material and rubbish connected therewith; and any portion of such refuse material or rubbish which the contractor may agree to deposit within the limits of said station shall be so deposited by the contractor, at his own expense, where the commandant may direct, within reasonable distance from the work. On the completion of the work the surroundings shall be thoroughly cleaned up, filled and graded to the established level or levels of

the station as the civil engineer or other officer in charge may direct, and all plant and surplus material and the cofferdam and its fillings shall be removed, by and at the expense of the contractor without unnecessary delay.

Fourth. The contractor stipulates and agrees to remove any and all obstructions at and in front of the entrance of the said dry dock, as per specifications.

Fifth. Insurance to the amount of fifty thousand dollars ($50,000) shall be effected in such manner and in such companies as shall be approved by the Chief of the Bureau of Yards and Docks, which insurance shall be renewed from time to time at the expense of the contractors; the loss, if any, to be stated in the policies as payable to the United States for whom it may concern.

Sixth. The contractor shall hold and save the United States harmless from and against all and every just and legal demand or demands of any nature or kind, for or on account of the adoption of any plan, model, design, or suggestion, or for or on account of the use of any patented
11 invention, article, or appliance, which has been or may be adopted or used in or about the construction of the said dry dock, its accessories, and appurtenances, or any part thereof, under this contract, or its use after completion, and to protect and discharge the Government from all liability on account thereof by proper releases from patentees or otherwise, and to the satisfaction of the Secretary of the Navy, before final payment under this contract shall be made.

Seventh. The construction of the said dry dock and its accessories and appurtenances herein contracted for shall conform in all respects to and with the plans and specifications aforesaid, which plans and specifications are hereto annexed and shall be deemed and taken as forming a part of this contract with the like operation and effect as if the same were incorporated herein. No omission in the plans or specifications of any detail, object, or provision necessary to carry this contract into full and complete effect, in accordance with the true intent and meaning hereof, shall operate to the disadvantage of the United States, but the same shall be satisfactorily supplied, performed, and observed by the contractor, and all claims for extra compensation by reason of or for or on account of such extra performance are hereby, and in consideration of the premises, expressly waived; and it is hereby further provided, and this contract is upon the express condition, that the said plans and specifications shall not be changed in any respect except upon the written order of the Bureau of Yards and Docks; and that if at any time it shall be found advantageous or necessary to make any change, alteration, or modification in the aforesaid plans and specifications, such change, alteration, or modification must be agreed upon in writing by the parties to the contract, the agreement to set forth fully the reasons for such change, and the nature thereof, and the increased or diminished compensation,
12 based upon the estimated actual cost thereof, which the contractor shall receive, if any: Provided, that whenever the said changes or alterations would increase or decrease the cost by a sum exceeding five hundred dollars ($500) the actual cost thereof shall be ascertained, estimated, and determined by a board of naval officers to be appointed by the Secretary of the Navy for the purpose; and the contractor shall

be bound by the determination of said board, or a majority thereof, as to the amount of increased or diminished compensation he shall be entitled to receive in consequence of such change or changes: Provided further, that if any enlargement or increase of dimensions shall be ordered by the Secretary of the Navy during the construction of said dry dock, that the actual cost thereof shall be ascertained, estimated, and determined by a board of naval officers, to be appointed by the Secretary of the Navy, who shall revise said estimate and determine the sum or sums to be paid the contractor for the additional work that may be required under this contract: And provided also, that no further payment shall be made unless such supplemental or modified agreement shall have been signed before the obligation arising from such change or modification was incurred and until after its approval by the party of the second part: And further provided, that no change herein provided for shall in any manner affect the validity of this contract.

Eighth. The aforesaid dry dock and its accessories and appurtenances, and each and every part thereof, shall be constructed of approved materials and in a thoroughly substantial and workmanlike manner, in accordance with the true intent, meaning, and spirit of the contract, plans, and specifications, to the satisfaction of the party of the second part.

Ninth. In case the completion of the dry dock, its accessories,
13 and appurtenances shall be delayed beyond the said period of twenty-seven calendar months, deductions of fifty dollars per day during the first three months following the expiration of said period and of one hundred dollars per day for each and every day beyond the expiration of the said three months may, in the discretion of the Secretary of the Navy, be made from the contract price of said dry dock; all such deductions to be made from time to time from any payment or payments falling due under the contract: Provided, however, that such delays shall not have been caused by the act of the United States, or its officers or agent, or by fire or water, or by any strike or stand out of workmen employed in or about the work, or by other circumstances beyond the control of the contractor: And provided further, that in case of such alleged delay, the contractor shall give immediate notice thereof to the Secretary of the Navy.

In case any question shall arise under the contract concerning deductions from the contract price of said dry dock, such question, with all the facts relating thereto, shall be submitted to the Secretary of the Navy for consideration, and his decision thereon shall be conclusive and binding upon all the parties to the contract.

Tenth. It is mutually understood, covenanted, and agreed, by and between the parties hereto, that the said dry dock shall not be accepted, and that the contractor shall not be entitled to the final payment or to preservations previously made, until twenty days after a complete test of said dock shall have been had under the direction of such officers as may be designated by the party of the second part, such test to consist of a full duty test of the pumping machinery and the docking of such vessels as the party of the second part may direct, the emptying of the dock, the refilling of the dock and the removal of such vessel without any
14 indication whatever of any defect, weakness, or settlement due to faulty material or workmanship in said dock, or either of its accessories, and the results of such test to be in all respects to the full and

complete satisfaction and approval of the officers designated to superintend the same. Such test shall be made within thirty days after the contractor shall have notified the party of the second part of the completion of the dock, and a decision upon the question of acceptance made within twenty days thereafter.

Eleventh. If, at any stage of the work, the contractor shall fail to go forward with the same, or to make satisfactory progress towards its completion within the specified time from causes within his control, as decided by the Chief of the Bureau of Yards and Docks, it shall be optional with the Secretary of the Navy to declare the contract forfeited on the part of the contractor. The contractor shall, upon receiving notice of such forfeiture, be indebted to the United States as for liquidated and ascertained damages in a sum equal to the aggregate of all advance payments made to him for or on account of work done under the contract, and agree to refund the same on demand within sixty days, and that the United States shall hold as collateral for such refund the dock and its appurtenances, or such part or parts as shall have been constructed or furnished. The Secretary of the Navy will thereupon appoint a board of competent persons which shall ascertain and declare the fair market value of all work done and materials on hand, including a reasonable and customary margin of profit upon the work done satisfactorily.

Upon the approval of the findings of said board by the Secretary of the Navy, he may proceed to complete the said dock and appurtenances in accordance with the contract, plans, and specifications, and the title to the dock and appurtenances, or such parts as shall have been completed, and all materials, shall forthwith vest in the United States, and the contractor shall surrender the same, together with the use of the works or plant, and all machinery, tools, and appliances theretofore used or necessary to be used in the completion of the work; any increase in the cost incurred by reason of the failure of the contractor to be at the contractor's expense. If, however, any balance shall appear in favor of the contractor, it shall be paid to and accepted by him in full discharge of all claims under the contract.

In case the said Secretary shall, under the provisions of this clause, declare this contract forfeited, such forfeiture shall not affect the right of the United States to recover for defaults which may have occurred hereunder, and as liquidated damages, the sum of money equal to the penalty of the bond accompanying the same: Provided, however, That if the contractor shall, by any of the causes specified in the ninth clause of this contract, be prevented either from commencing or completing the work at the time agreed upon in this contract, such additional time may, in writing, be allowed him for such commencement or completion as, in the judgment of the Secretary of the Navy, shall be just and reasonable; but such allowance and extension shall in no manner affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely as if the new date for such commencement or completion had been the date originally herein agreed upon.

Twelfth. The covenants, conditions, and provisions relating to payments under this contract are hereby mutually understood and agreed upon by and between the respective parties as follows—that is to say:

1. The contract price to be paid for the timber dry dock and its acces-

sories and appurtenances, to be constructed in accordance with this contract, shall be four hundred and twelve thousand dollars ($412,000) United States currency.

16 2. The amount of material provided and of work performed by the contractor, monthly, shall be taken as a basis for making payments under this contract, and shall be determined by a fair schedule and classification of prices furnished by the contractor and annexed hereto and forming a part of this contract, the said schedule being subject to change as set forth in the specifications hereto attached and forming part of this contract.

3. The officer in charge shall, on or before the fifth day of each month during the progress of the work, prepare an estimate of the work done and materials furnished and delivered during the month preceding the first day of the month then current, according to the rates specified in the schedule aforesaid, and certify as to the amount properly payable thereunder, which estimate shall be submitted to the commandant of the station where such dock is in course of construction for his approval.

4. When such estimate shall have been approved by the commandant as aforesaid, the respective amounts thereof, less ten per cent, shall be paid through the issuance and delivery to the contractor of bills in triplicate, duly certified by the officer in charge and approved by said commandant and the Chief of the Bureau of Yards and Docks, and every such payment shall be deemed a payment on account of the aforesaid contract price.

5. The reservation of ten per cent on each monthly payment, as above provided for, shall be held until this contract shall have been fully performed by or on the part of the party of the first part, and the said dry dock, its accessories and appurtenances, shall have been finally accepted by the party of the second part; and no monthly or other payment shall be made under this contract except upon approval by the officer in charge of all work done and material furnished at the rates specified in

17 the schedule of prices up to the first of the month previous to the date of such payment, nor without satisfactory evidence, such as a county clerk's certificate, furnished by the contractor to said officer, that there are no existing liens other than that of the United States upon such work or materials at the date of such approval.

6. When all the conditions, covenants, and provisions of this contract shall have been performed and fulfilled by and on the part of the contractors, he shall be entitled, within ten days after the filing and acceptance of his claim, to receive the said reserve, and any sums not covered by the monthly estimates, or so much thereof as he may be entitled to, on the execution of a final release to the United States, in such form as shall be approved by the Chief of the Bureau of Yards and Docks, of all claims of any kind or description under or by virtue of this contract.

Thirteenth. It is hereby mutually and expressly covenanted and agreed, and this contract is upon the express condition, that no Member of or Delegate to Congress, officer of the Navy, or any person holding any office or appointment under the Navy Department, shall be admitted to any share or part of this contract, or to any benefit to arise therefrom; that this contract shall not nor shall any interest therein be transferred by the contractor to any other person or persons, and that any such transfer shall subject the contractor to a forfeiture of his rights hereunder, all

right of action to recover for any breach of this contract being, however, reserved to the United States.

Fourteenth. It is expressly understood, covenanted, and agreed, by and between the parties to this contract, that, if any doubts or disputes arise as to the meaning or requirements of anything in this contract, or if any discrepancy appear between the aforesaid plans and specifications and this contract, the matter shall be at once referred for the
18 consideration and decision of the Chief of the Bureau of Yards and Docks, and his decision thereon shall be final, subject, however, to the right of the contractor to appeal from such decision to the Secretary of the Navy, who, in case of such appeal, shall be furnished by the contractor with a full and complete statement of the grounds of his appeal, in writing, and shall thereupon take such action in the premises as, in his judgment, the rights and interests of the respective parties to this contract shall require, and the party of the first part hereby binds himself and his heirs and assigns, and his personal and legal representatives, to abide by his, the said Secretary's, decision in the premises.

In witness whereof, the respective parties have hereunto set their hands and seals the day and year first above written.

JOHN GILLIES. [L. S.]
N. H. FARQUHAR, [L. S.]
Chief of the Bureau of Yards and Docks.

Signed and sealed in the presence of—
WILLIAM WILLS.
As to N. H. F.,
A. E. MERRITT.

19 B.

This agreement, entered into this 16th day of June, 1893, between John Gillies, contractor, for the construction of a dry dock at the U. S. Navy-Yard, Brooklyn, New York, party of the first part, and Norman H. Farquhar, Chief of the Bureau of Yards and Docks of the Navy Department, for and in behalf of the United States, party of the second part,

Witnesseth: That, whereas, the Navy Department has decided to lengthen the said dry dock from six hundred (600) feet, as called for in the specifications forming a part of the contract for the construction of a dry dock at the above-mentioned location, entered into by the above-mentioned parties of the first and second parts on the 17th of November, 1892, to six hundred and seventy (670) feet from the outer gate sill to the coping at the head of the dock.

And, whereas, a board of naval officers, consisting of Captain J. N. Miller, U. S. N., Civil Engineer P. C. Asserson, U. S. N., and Civil Engineer F. C. Prindle, U. S. N., was ordered by, and did convene, by order of the Secretary of the Navy, in compliance with the requirements of paragraph 7, page 2, of the contract, to fix this additional compensation to be allowed to said party of the first part for the additional labor and material required for said extension.

And, whereas, said board of naval officers, after careful and mature deliberation, did fix the additional compensation to be paid said party of the first part for the said extension of the said dry dock at forty-five

thousand five hundred and fifty-six ($45,556) dollars, and did allow an extension of three (3) months' time on account of said extension of said dry dock.

Now, therefore, the party of the first part does hereby agree to
20 extend the said dry dock to a length of six hundred and seventy (670) feet, measuring from the outer gate sill to the coping at the head of the dock, in the same manner and under the same conditions as though said extension had been included in the original contract.

And it is further agreed by the party of the first part to accept from the United States, as a just compensation for said work of extension, the sum of forty-five thousand five hundred and fifty-six ($45,556) dollars, in full therefor, payment to be made under the same conditions and requirements as exacted by the original contract.

And it is further agreed by the party of the second part that, in full and just compensation to the party of the first part, the sum of forty-five thousand five hundred and fifty-six ($45,556) dollars shall be paid for the additional labor and material necessary to extend the said dry dock, as heretofore agreed to, payments to be made under the same conditions and requirements as exacted in the original contract.

And it is therefore agreed that the time fixed in the original contract for the completion of the said dry dock shall be extended three (3) months, on account of the extra labor necessary to carry out the extension of the said dry dock as called for by this agreement.

JOHN GILLIES. [L. S.]
N. H. FARQUHAR, [L. S.]
Chief of the Bureau of Yards and Docks.

Signed and sealed in the presence of—
ANSON S. TAYLOR.
As to N. H. F.,
A. E. MERRITT.

21 DISTRICT OF COLUMBIA, ss:

I, A. S. Taylor, a notary public in and for the District, do hereby certify that John Gillies, party to a certain agreement bearing date the 16th day of June, A. D. 1893, and hereunto annexed, personally appeared before me in the said District. The said John Gillies, being personally known to me, acknowledged the execution of the said agreement to be his act and deed.

Witness my hand and notarial seal this 16th day of June, A. D. 1893.

[SEAL.] A. S. TAYLOR,
Notary Public.

C.

This agreement, made and concluded this seventeenth day of August, A. D. 1893, by and between John Gillies, of the city of Brooklyn, in the State of New York, party of the first part, and the United States, represented by N. H. Farquhar, U. S. Navy, Chief of the Bureau of Yards and Docks, Navy Department, acting under the direction of the Secretary of the Navy, party of the second part,

Witnesseth: That whereas it has been deemed desirable to change the location of the dry dock now being constructed at the U. S. Navy Yard

at Brooklyn, New York, under contract with the said John Gillies, party of the first part, dated November 17th, A. D. 1892:

Now, therefore, this agreement witnesseth that in consideration of the premises and for and in consideration of the payment to be made as hereinafter provided for, the party of the first part, for himself, his
22 heirs and assigns, and his legal and personal representatives, agrees to and with the United States that he will, in the construction of the said dry dock, change its location to one sixty-four (64) feet further inland than that laid down and staked out when the said contract was entered into, and that he will perform all the additional excavation necessary at the entrance of the dry dock in consequence of the said change of location; also all the additional work necessary to lengthen the suction pipes provided to be laid from the present pump house, including the piping, round piles, sheet piles, timber, iron work, excavation, and back filling, etc., and all other work incident to said change of location, supplying all the labor and materials therefor.

And this agreement further witnesseth that the United States, party of the second part, in consideration of the stipulations, agrees that for the faithful performance of this agreement by the party of the first part there shall be paid to the said party of the first part the sum of five thousand and sixty-three dollars and eighteen cents ($5,063.18), United States currency, as full compensation. Said payment to be made in accordance with all the terms and conditions of payments as provided in the said contract and specifications.

And the United States further agrees that the time limited by the said contract for the completion of the dry dock shall be extended for a period of eight (8) weeks on account of the said change in the position of the dry dock.

It is also agreed that the provisions and conditions contained in the said contract and the specifications thereto attached, in regard to the character and quality of the materials and workmanship, shall apply to the work as herein modified.

This agreement is made under the provisions of and in accordance with article "seventh" of the said contract.

23 In witness whereof the respective parties have hereunto set their hands and seals the day and year first above written.

JOHN GILLIES. [L. S.]
N. H. FARQUHAR, [L. S.]
Chief of the Bureau of Yards and Docks.

Signed and sealed in the presence of—
P. C. ASSERSON, C. E., U. S. N.
G. H. PERKINS.

(Endorsed:) Amended complaint. Filed September 10, 1898.

24 Circuit court of the United States for the eastern district of New York.

UNITED STATES OF AMERICA, PLAINTIFF,
against
JOHN GILLIES, HENRY HAMILTON, HUGH McROBERTS, and Catharine Freel, Edward J. Freel, and Frank J. Freel, as executors of the last will and testament of Edward Freel, deceased, defendants.
} Demurrer.

Edward J. Freel, one of the defendants herein, as executor of the last will and testament of Edward Freel, deceased, hereby demurs to the amended complaint herein upon the ground that it appears upon the face thereof that said amended complaint does not state facts sufficient to constitute a cause of action.

Dated, New York, November 16th, 1898.

TRACY, BOARDMAN & PLATT,
Attorneys for Defendant, Edward J. Freel, etc.,
35 Wall Street, New York City.

To Hon. GEORGE H. PETTIT,
Plaintiff's Attorney, Post-Office Building, Brooklyn, New York.

(Endorsed:) Demurrer to amended complaint. Filed November 26, 1898.

25 United States circuit court, eastern district of New York.

UNITED STATES OF AMERICA
vs.
EDWARD J. FREEL, IMPLEADED WITH John Gillies and others.
} February 16, 1899.

Mr. George H. Pettit, Mr. Robert H. Roy, for plaintiff; Mr. James R. Soley, Mr. Howard A. Taylor, for defendant.

Where the release of a contractor's surety from the obligation of a building contract on account of subsequent changes therein, without his consent, is involved, the true meaning and intent of the contract should be ascertained according to usual rules of construction; but when the expressed intention of the parties has been determined, the obligation of the surety is strictissimi juris, from which he is discharged by any alteration of the substantial terms of the contract, whether the same be harmful or beneficial to him. Where the contract authorizes the parties to enter into auxiliary contracts for alterations of the work from that shown in the plans and specifications, without invalidating the primary contract, the parties may stipulate, without releasing the surety, for such enlargement or extension of the work as in nature magnitude and expense would be consistent with and bear a reasonable and subsidiary relation to the work first undertaken.

26 Under such a provision the alteration of the plans and specifications of a contract for the construction of a dry dock for the United States, in consideration of $612,000, so that its length should be 670 rather than 600 feet, with an increased payment of $45,556, and an extension of the time of performance for three months, was within the contemplation of the parties and sureties to the original contract, and the latter were not released thereby. But a supplemental contract changing the location of the entire dry dock from the water side, as provided in the initial contract, to a location sixty-four feet inland, and requiring the contractor to make all necessary excavations and connections with the water at an increased payment of $5,063.18, and with an increased time for performance, released the sureties, inasmuch as all consent of the sureties anticipating changes in the contract related to alterations in the attached plans and specifications, of which the location of the structure was no part.

THOMAS, J.

The question presented on this demurrer is whether the sureties of a contractor who undertook by contract concluded with the United States, on the 17th of November, 1892, in consideration of $612,000, to build a dry dock, "to be located at such place on the water line of the Navy-Yard, Brooklyn, N. Y., as shall be designated," are relieved from liability by reason of a change of such contract by a supplemental agreement concluded between the contractor and the United States, on the 16th day of June, 1893, whereby it was stipulated that the dry dock should be extended to the length of 670 feet, which was 70 feet in excess of the length as originally provided, at an agreed price of $45,556, whereby also "the time fixed in the original contract for the completion of
27 the said dry dock shall be extended three (3) months on account of the extra labor," &c.; or are relieved from liability by reason of an agreement concluded on the 17th of August, 1893, between the contractor and the United States, whereby, in consideration of $5,063.18, to be paid the contractor, it was stipulated to "change its location to one sixty-four (64) feet further inland than that laid down and staked out when the said contract was entered into," and whereby the contractor undertook that "he will perform all the additional excavation necessary at the entrance of the dry dock in consequence of the said change of location; also all the additional work necessary to lengthen the suction pipes provided to be laid down from the present pump house, including the piping, round piles, sheet piles, timber, ironwork, excavation and back filling, etc., and all other work incident to said change of location, supplying all the labor and materials therefor;" whereby, also, "the time limited by the said contract for the completion of the dry dock shall be extended for the period of eight (8) weeks."

The plaintiff answers the contention that the supplementary contracts effect the discharge of the sureties by the claim that such contracts were made pursuant to the seventh article of the contract, whereby the sureties anticipated such contracts and consented thereto. Before considering the seventh article a survey of the applicable law may be obtained by summarizing the holdings.

I. The obligation of the surety is coincident primarily with that of his

principal. Benjamin v. Hillard, 23 How., 149, 164; McCluskey v. Cromwell, 11 N. Y. (1 Kern.), 593, 598; St. Albans Bank v. Dillon, 30 Vt., 122, 126.

II. In estimating the extent of the liability of a surety for the performance of a contract, the true intent, meaning, and fair scope of the contract should be ascertained. U. S. v. Boyd, 15 Pet., 187, 208;
28 Smith v. U. S., 2 Wall., 219, 235; Lee v. Dick, 10 Pet., 482; McCluskey v. Cromwell, 11 N. Y. (1 Kern.), 593, 598; Gates v. McKee, 13 N. Y., 232, 235; Dobbin v. Bradley, 17 Wend., 422, 425; Crist v. Burlingame, 62 Barb., 351, 355; Northern Light Lodge v. Kennedy, 73 N. W. Rep., 524; Wehr v. Ger. Luth. Church, 47 Md., 177, 187; Beers v. Wolf, 116 Mo., 179, 184; Lionberger v. Krieger, 80 Mo., 160; Locke v. McVean, 33 Mich., 473.

III. In ascertaining its true intent, meaning, and scope, the same rules of construction should be employed as are used in the interpretation of other contracts. The extent of the surety's obligation must be determined from the language used, read in the light of the circumstances surrounding the transaction. But when the intention of the parties has thus been ascertained, then the courts carefully guard the rights of the surety and protect him against a liability not strictly within the precise terms of his contract. Leggett v. Humphreys, 21 How., 66, 73; Natl. Mech. Bank Assoc. v. Conkling, 90 N. Y., 116, 121, 122; McCluskey v. Cromwell, 11 N. Y., 593; Crist v. Burlingame, 62 Barb., 351; Ludlow v. Simond, 2 Caine's Cases in Error, 271; Weir Plow Co. v. Walmsley, 110 Ind., 242, 246; Irwin v. Kilburn, 104 Ind., 113; Birdsall v. Heacock, 32 Ohio, 177; Dobbin v. Bradley, 17 Wend., 422, 425; Gamble v. Cuneo, 21 App. Div., 413; People v. Backus, 117 N. Y., 196, 201; Smith v. Molleson, 148 N. Y., 241, 246; Gates v. McKee, 13 N. Y., 232, 237; Belloni v. Freeborn, 63 N. Y., 383; Brandt on Suretyship and Guaranty, sec. 54.

IV. The liability of the surety can not be extended by implication. Miller v. Stewart, 9 Wheat., 680; U. S. v. Boyd, 15 Pet., 187, 208; Smith v. U. S., 2 Wall., 219, 234; U. S. v. Boecker, 88 U. S. (21 Wall.), 652;
U. S. v. American Bonding, &c., Co., 89 Fed. Rep., 925; Dobbin
29 v. Bradley, 17 Wend., 422, 425; Livingston v. Moore, 15 App. Div., 15; Raney v. Baron, 1 Fla., 327; Field v. Rawlings, 6 Ill. (1 Gilm.), 581; Manufacturers' Bank v. Cole, 39 Me., 188; Blair v. Perpetual Ins. Co., 10 Mo., 559; Henderson v. Marvin, 31 Barb. (N. Y.), 297; Grant v. Smith, 46 N. Y., 93, 97.

V. A surety has the right to stand on the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, his liability will be extinguished, even though such alteration be for his own benefit. Miller v. Stewart, 9 Wheat., 680; Miller v. Stewart, 4 Wash., 26; U. S. v. Boecker, 88 U. S., 652, 657; Smith v. U. S., 2 Wall., 219; Martin v. Thomas, 24 How., 315, 317; Reese v. U. S., 9 Wall., 13, 21; U. S. v. Tillotson, 1 Paine, 305, 324; U. S. v. American Bonding &c. Co., 89 Fed. Rep., 925; Earnshaw v. Boyers, 60 Fed. Rep., 528; Ludlow v. Simond, 2 Caine's Cases in Error, 1; U. S. v. Hilligas, 3 Wash., 70; Grant v. Smith, 46 N. Y., 93, 97; Paine v. Jones, 76 N. Y., 274, 279; Page v. Krekey, 137 N. Y., 307, 314; Dobbin v. Bradley, 17 Wend., 422; Bangs v. Strong, 7 Hill, 250; Livingston v. Moore,

15 App. Div. (N. Y.), 15; Mackay v. Dodge, 5 Ala., 388; Bethune v. Dozier, 10 Ga., 235; Taylor v. Johnson, 17 Ga., 521; Weir Plow Co. v. Walmsley, 110 Ind., 242; Mahew v. Boyd, 5 Maryland, 102; Brigham v. Wentworth, 11 Cush. (Mass.), 123; Manufacturers' Bank v. Cole, 39 Me., 188, 193; Simonson v. Grant, 36 Minn., 439; Beers v. Wolf, 116 Mo., 179; Ryan v. Morton, 65 Tex., 258; Wylie v. Hightower, 74 Tex., 306; Bonar v. MacDonald, 3 H. L. Cas., 226, 239; Rees v. Berrington, 2 Vesey, jr., 540.

(*a*) While the authorities state that the surety is relieved, whether the alteration is material or not, Paine v. Jones, Page v. Krekey, Livingston v. Moore, supra, yet it is probable that trivial or very minor changes, relating to detail, and not effecting any substantial change in the terms of the contract will not release the sureties. Grant v. Smith,
30 46 N. Y., 93, 96; U. S. v. Tillotson, 1 Paine (U. S. C. Ct.), 305; Mahew v. Boyd, 5 Md., 102; Weir Plow Co. v. Walmsley, 110 Ind., 242.

(*b*) Changes in the specifications of building contracts fall within this rule. Evans v. Graden, 125 Mo., 72; Beers v. Wolf, 116 Mo., 179.

VI. A variance in the agreement, without the sureties' consent, by a modifying contract, releases the sureties, although the alleged liability is incurred under the original contract. Bonar v. MacDonald, 3 H. L. Cas., 226; Pybus v. Gibb, 38 Eng. Law and Eq., 57.

VII. A contract for new work, by which no new terms are added to the original contract, and whereby the prior contract is in no way embarrassed by greater difficulties of fulfillment, does not release the sureties (Ryan v. Morton, 65 Tex., 258; Barclay v. Deckerhoof, 151 Penn., 375) where the contract for additional work was endorsed on the original contract. See also Warden v. Ryan, 37 Mo. App., 467.

(*a*) The construction by a contractor engaged to build a sewer of 15 additional feet is not a modification of the original contract discharging his sureties, but is a new and additional contract. Fitzpatrick v. McAndrews, 12 Pa. Co. Ct., 353.

VIII. If the primary contract contemplates changes in the work, either in nature or extent, similar to that stipulated in the supplemental contract, the performance whereof will be obligatory upon the contractor, the surety's consent to the secondary contract will be deemed to have been anticipated by his placing himself in the relation of surety to the original contract. Wehr v. German Lutheran Church, 47 Maryland, 177; Village of Chester v. Leonard, 68 Conn., 495; De Mattos v. Jordan, 15 Wash., 378, 386; Northern Light Lodge v. Kennedy,
31 No. Dak. (1879), 73 N. W. Rep.; Beers v. Wolf, 116 Mo., 179; Stewart v. McKean, 110 Exch., 675; Hayden v. Cook, 34 Neb., 670.

(*a*) It is immaterial that the primary contract does not make the execution of the changes obligatory upon the contractor, provided it empower him to make a subsidiary contract for the performance thereof, or contemplate that he may make voluntarily such contract. Northern Light Lodge v. Kennedy, No. Dak. (1879), 73 N. W. Rep.; Beers v. Wolf, 116 Mo., 179, 185.

IX. Where the original contract provides that the agreement for changes shall be in writing, alterations made pursuant to verbal agreements or directions, without the consent of the surety, release him.

Eldridge v. Fuhr, 59 Mo. App., 44; Killoren v. Meehan, 55 Mo. App., 427; Beers v. Wolf, 116 Mo., 179. But see Smith v. Molleson, 148 N. Y., 240.

(*a*) When the contract is to be agreed upon between the superintendent and the parties of the second part, the sureties must be parties to the supplemental agreement if they are formal parties to the first contract. Beers v. Wolf, 116 Mo., 179.

X. Where the original contract provides for making payments to the contractor in certain amounts, a departure from such method of payment may discharge the sureties. The Village of Chester v. Leonard, 68 Conn., 495; Rowan v. Sharp's Co., 33, Conn., 1; Howard Co. v. Baker, 119 Mo., 397; Ryan v. Morton, 65 Tex., 258; Evans v. Graden, 125 Mo., 72; Bragg v. Shain, 49 Cal., 131; Steam Navigation Co. v. Rolt, 6 C. B., N. S., 550; Calvert v. Landon Docks Co., 2 Keen, 638. See De Mattos v. Jordan, 15 Wash., 378; Leavel v. Porter, 52 Mo., 632.

The seventh article, to which reference is made above, is as follows:

32 "Seventh. The construction of the said dry dock and its accessories and appurtenances herein contracted for shall conform in all respects to and with the plans and specifications aforesaid, which plans and specifications are hereto annexed, and shall be deemed and taken as forming a part of this contract, with the like operation and effect as if the same were incorporated herein. No omission in the plans or specifications of any detail, object, or provision necessary to carry this contract into full and complete effect, in accordance with the true intent and meaning hereof, shall operate to the disadvantage of the United States, but the same shall be satisfactorily supplied, performed, and observed by the contractor, and all claims for extra compensation by reason of, or for or on account of, such extra performance, are hereby, and in consideration of the premises, expressly waived; and it is hereby further provided, and this contract is upon the express condition, that the said plans and specifications shall not be changed in any respect, except upon the written order of the Bureau of Yards and Docks; and that if at any time it shall be found advantageous or necessary to make any change, alteration, or modification in the aforesaid plans and specifications, such change, alteration, or modification must be agreed upon in writing by the parties to the contract, the agreement to set forth fully the reasons for such change, and the nature thereof, and the increased or diminished compensation, based upon the estimated actual cost thereof, which the contractor shall receive, if any: Provided, that whenever the said changes or alterations would increase or decrease the cost by a sum exceeding five hundred dollars ($500) the actual cost thereof shall be ascertained, estimated, and determined by a board of naval officers to be appointed by the Secretary of the Navy for the purpose, and the contractor shall be bound by the determination of said board, or a majority thereof, as to the amount of increased or

33 diminished compensation he shall be entitled to receive in consequence of such change or changes. Provided further, that if any enlargement or increase of dimensions shall be ordered by the Secretary of the Navy during the construction of said dry dock that the actual cost thereof shall be ascertained, estimated, and determined by a board of naval officers, to be appointed by the Secretary of the Navy, who shall

revise said estimate and determine the sum or sums to be paid the contractor for the additional work that may be required under this contract: And provided also, that no further payment shall be made, unless such supplemental or modified agreement shall have been signed before the obligation arising from such change or modification was incurred, and until after its approval by the party of the second part: And further provided, *that no change herein provided for shall* in any manner affect the validity of this contract."

A characteristic feature of this article is, as well stated by the demurrant, the statute of fraud which it embodies. Its salient and essential purpose was to guard the Government from claims for extra work. This appears repeatedly as the section progresses. The contract is declared to be upon the express condition that the plans and specifications shall not be changed except upon a written order of the Bureau of Yards and Docks, and that if it shall be found "advantageous or necessary" to make any change "in the aforesaid plans and specifications" the same must be agreed upon by the parties to the contract. This is followed by the proviso that, where the increased cost exceeds $500, a board of naval officers shall determine the sum to be paid or deducted from the contract; and the second proviso states "that if any enlargement or increase of dimensions shall be ordered by the Secretary of the Navy during the construction" the same shall be ascertained by a board of naval officers, who shall determine the sum that shall be
34 paid to the contractor for the "additional work that may be required under this contract;" and the third proviso is to the effect that "no further payment shall be made unless the supplemental or modified agreement shall have been signed before the obligation arising from such change or modification was incurred, and until after its approval by the party of the second part." There is a final proviso that "no change herein provided for shall in any manner affect the validity of this contract."

It is unnecessary to determine whether it would be obligatory upon the contractor to enter into the supplemental contract to which reference is made in this article, however doubtful it may be whether the United States is protected in that regard. Nevertheless, the article does provide a procedure to be observed, should occasion arise, for deduction from, or addition to, the work as prescribed in the plans and specifications, and it is contemplated, at least, that the contractor may enter voluntarily into such a contract, and that such contract shall not affect the validity of the main agreement. Did not the sureties, when reading this provision, discover and understand that such changes might be called for; that the contractor might make a supplemental contract therefor, and that the change stipulated would not invalidate the original contract to which they stood in the relation of parties? Would it be reasonable to hold that the sureties understood, or were fairly justified in understanding, while reading this seventh article, that any changes made pursuant to it would release them from their relation to the original contract, whose continued validity was declared, notwithstanding such changes? Finally, would it be consonant with the intention of the parties, including the sureties, to read into the seventh article a provision that the making of an auxiliary contract without the consent of the sureties

should release them? It is considered that, although the contractor
35 was not by any specific terms obligated to enter into any subsidiary agreement, yet that he might be asked to do so, and that the article contemplated his assent to modifications of the work, without impairing the main obligation or the liability of those who assured its performance. If this be correct, did the contemplated change of the contract justify the agreement for the 70 feet extension of the dock? This presents a grave question, and its solution requires some just rule of general application. Do sureties by consenting to changes involving an enlargement of the work consent to an unlimited extension thereof? Could the dry dock have been doubled in length? If the contract were for a two-story house, could it have been increased to twenty stories? If it were agreed that the material should be of wood, could marble be substituted? Obviously such excessive changes would not be within the thought or the understanding of the parties or the sureties. But a rule of interpretation, otherwise suitable, can not be defeated by showing the absurdity of its unlimited application. All rules operate within reasonable limits, and the court regards their legitimate use and not their abuse. Where a building contract contemplates changes in the work which will bind the sureties for the fulfillment of the contract as modified the changes subsequently made must bear in extent and value some reasonable ratio to the original structure. If the plans and specifications call for a house of particular dimensions and quality, a consent to changes anticipated in the contract should be construed to be limited to changes relevant to, and consistent with, the structure first projected. Changes of such nature, and only such changes, would be anticipated by all the parties to the contract as would be reasonable and cognate to the structure primarily planned and its purpose. In the case at bar, a large dry dock was required by the United States to be located at a principal navy-yard,
36 and it was manifestly intended for the accommodation of all classes of Government vessels. Article seventh manifestly contemplated that changes in its dimensions might be required, and provided for auxiliary contracts for fixing a due consideration for such extension, without disturbing otherwise the continuance of the principal engagement. The subsidiary contract provided for an extension of 70 feet, which was nearly twelve per cent of the length first adopted, at an increased cost of about seven and one-half per cent of the whole consideration. Considering the magnitude of the structure as first intended, and its great expense, and the large use to which it was devoted, the change seems to be such as the parties might have had in view in subscribing to the provisions of the seventh article. The change is a homogeneous and not an incongruous addition, nor even a duplication of parts, as would be the case in multiplying the stories of a house, but it is the mere symmetrical enlargement or extension of a specific thing, the construction of which was undertaken, and such enlargement is not greater than the customary use of a dry dock by the Government might demand in common reason. Although article seven might well have contained clearer provisions for the continued obligation of the sureties and the protection of the Government thereby, yet it seems to admit fairly of the interpretation given.

There have been various judicial expositions of the allowable departure from original plans and specifications, when some change of plans

was contemplated by the original building contract, to some of which reference will be made. Slight and inexpensive departure did not release the sureties. Risse *v.* Hopkins Planing Co. (Kan.), 40 Pac., 904; see cases in opinion; so reasonable alterations that did not materially increase the cost, Consaul *v.* Sheldon, 35 Neb., 247, 52 N. W., 1104; so change of material for the window lintels of a court-house from stone to railroad iron, Howard County *v.* Baker, 119 Mo., 397; so sinking the foundation of a building two or three feet deeper, in the course
37 of repair, Ashenbroedel Club v. Finlay, 53 Mo. App., 256; so enlargement of a church three and a half feet and the change of the material for certain foundations from brick to stone, the court stating that "it is no argument against the construction adopted that there is great difficulty in fixing a limit within which additions and alterations might be made," Wehr v. German Lutheran Church, 47 Md., 177; so even unnecessary alterations, amounting to less than $250, made by direction of the architect, Western Building, &c., Assoc. v. Fitzmaurice, 7 Mo. App., 283; so in the case of a contract to build waterworks, where a line of pipes to be laid in a highway, for a distance of over 2,500 feet, was transferred to private property; another line was changed from one street to another, and considerably lengthened; another line was shifted for a distance of over a mile, so as to be at some points 200 feet from that marked on the original plans; and where the dimensions and length of some of the pipes also varied, so as to call for additional expense on the part of the contract, none of which changes were necessary to the proper fulfillment of the work, Village of Chester v. Leonard, 68 Conn., 495; so in the erection of a building in the city of Fargo, North Dakota, where alterations were made which increased the price $1,000, Northern Light Lodge v. Kennedy, No. Dak. (1879), 73 N. W. Rep.; so the surety on a bond for the faithful performance of a building contract, which provided that the owner should have the right during the progress of the work to make changes and alterations in the building, was not released by the fact that during the progress of the work some changes and additions in the building were made which increased its cost to an inconsiderable extent, Hayden v. Cooke, 34 Neb., 670.

Respecting the change of location of the dry dock a different conclusion is necessary. The contract itself, as distinguished from the plans
38 and specifications, provides that the dock shall be built on the water side, while the supplemental contract expressly changes the location to a point seventy feet from the water side, and provides that the contractor shall do all the excavation and work and furnish all the additional material, necessitated by the change, at an increased remuneration of $5,063.18. The transfer of the site seventy feet from the water side is of itself a distinct departure from the original project. In considering whether this change releases the sureties it should be remembered that broad, liberal, and equitable considerations may not prevail, but rather that the rule is technical and strict. It has been said that sureties are favorites of the law. Ludlow v. Simond, 2 Caine's Cases in Error, 1, 29. It may be said better that the surety assures the performance of a certain contract, and his liability is conditioned inflexibly upon the continuance of the very terms of that contract. If the principal parties thereto change their agreement there springs into being a new contract

to which the sureties are strangers, and if the guaranty of its performance is desired it must be obtained de novo. Of this a learned judge said as follows: "Now, it must always be recollected in what manner a surety is bound. You bind him to the letter of his engagement. Beyond the proper interpretation of that engagement you have no hold upon him. He receives no benefit and no consideration. He is bound, therefore, merely according to the proper measure and effect of the written engagement he has entered into. If that written engagement is altered in a single line, no matter whether it be altered for his benefit, no matter whether the alteration be innocently made, he has a right to say, 'the contract is no longer that for which I engaged to be the surety. You have put an end to the contract I guaranteed, and my obligation, therefore, is at an end.'" Blest v. Brown, 6 L. T., N. S., 620. This holding illustrates the tendency of the rule. In any case, the
39 surety in binding himself to the first contract limited rigidly his liability to that instrument, and its scope measures with precision his undertaking. If he consented to vouch unwisely, he is entitled to suffer to the full measure of his folly without a favorable revision of his liability by the principal. And on the other hand, it is his right to fix the final boundary of his faith in the financial, and in the case of a building contract, the architectural capacity of his principal, and mark out in the agreement whatever method should attend the execution of the work, and the main contracting parties may not add ever so little to the burden which the contractor has assumed, or deviate from the methods which were to accompany its fulfillment. It results from this that he who would charge a surety for his principal's breach of contractual duty must travel without deviation the way pointed out in the contract, however ironbound it may be, for there is for the surety in the enforcement of his bond no equity nor latitude beyond its strict terms. Such is the nature of the implied condition upon which the surety's liability depends.

In the case at bar the plaintiff is bound, when a breach of condition is alleged to plead performance or waiver of the condition, which waiver would be inferred from a consent to the change of location. But this it has failed to do, because from the nature of the case it could not be done. At this juncture the seventh article does not aid. That article consents to changes in the plans and specifications "annexed" to the contract, and the whole article has immediate and sole reference thereto, and does not provide for alteration in the location of the structure itself, which location is no part of the plans and specifications, but has its own distinct place in the contract. Therefore there seems to be no saving clause respecting this change of location, and the case falls within the stern rules which have been presented. Some knowledge of the strict-
40 ness with which the law here involved has been applied may be obtained from a consideration of similar contracts.

In the United States v. Corwine, 1 Bond, 339, 25 Fed. Cases, 671, the principals bound themselves to the United States to open a ship canal three hundred feet wide and twenty feet deep, and keep it open, of such dimensions, for four and a half years from the time of acceptance by the Secretary of War. The principals did not perform their agreement for opening the canal according to its terms, and the Government accepted

the work with a channel only eighteen feet in depth. The sureties of the contractor were released by the change in the terms of the contract.

In the United States v. Tillotson, 1 Paine (Circuit Courts Reports, 305), a person made a contract with the War Department to build a fort, in which it was provided that the fortification was principally, as to the revetment walls, to be built of brick, and thereafter there was an auxiliary contract, by which it was agreed that in place of brick a certain composition called tapia, which was a species of artificial stone formed by a union, in proper porportions, of sharp sand, fresh lime, and oyster shells, with water sufficient to produce adhesion, should be used in such portions of the walls as should be designated by the superintending engineer, and the contractor stipulated to receive $10 for every cubic yard of tapia, instead of $11 for every cubic yard of brickwork as mentioned in the agreement. This was held to be a material alteration and released the contractor's surety.

In The United States v. Case, 25 Int. Rev. Record (U. S. circuit court, 2d cir.), 1879, 56, the guarantors undertook that a bidder for a contract to furnish stone about to be let by the plaintiff, would, in case the contract was awarded to him, enter into the contract with sufficient sureties to furnish the material in conformity to the terms of the advertisement under which the bid was made. It was held, under the facts
41 presented, that the undertaking was that a contract should be executed to furnish stone of a description designated by a sample which was to accompany the proposal, and that the guarantors were released when the bid was to furnish a different kind of stone from certain quarries.

In Mundy v. Stevens, 61 Fed. Rep., 77, sureties for the payment by a contractor to a subcontractor of all moneys received for work under a Government contract as provided in the contract, were released by an alteration of such agreement whereby the right secured to the original contractors to deduct from the monthly payments three cents per yard for material dredged, subsequently was modified so that payments of two and a half cents per cubic yard should be made monthly.

In the United States v. Boecker, 88 U. S., 652, it was held that where a distiller's bond recited that a person is about to be the distiller at one place, to wit, "at the corner of Hudson street and East avenue, situate in the town of Canton," his sureties are not liable for taxes in respect of business carried on by him at another, as "at the corner of Hudson and Third streets" in the same town, even though he had no distillery whatever at the first-named place, about four squares from the last-named place.

In Grant v. Smith, 46 N. Y., 93, it was decided that a change of a contract to purchase a steam engine and two boilers of a given capacity and power, at an agreed price, by which an engine with three boilers and of greater capacity and power was substituted, at an additional price, released the sureties.

In Ludlow v. Simond, 2 Caine's Cases in Error, 271, it was held that where a surety agreed to make good a deficiency in the sale of property at a particular place, he was released if the sale was had at a different place, by order of the agent of the principal.

42 In Rowan v. Sharps, &c., Co., 33 Conn., 1, a contract provided that rifles should be made "with all possible dispatch," but a

supplemental contract, made before performance, provided that three hundred rifles per week should be delivered for a certain period, and six hundred per week afterwards. The surety was discharged.

In Bethune v. Dozier, 10 Ga., 235, the obligee bound himself to furnish eight hundred acres of pine land to furnish stock for a sawmill, and the principal accepted of six hundred and eighty acres in fulfillment of the contract, without the surety's consent, and it was held that the surety was discharged.

In Zimmerman v. Judah, 13 Ind., 286, it was decided a supplementary agreement to put an additional story on a house released the surety for the contractor in the original contract.

In Morgan Co. v. McRea, 52 Kan., 358, the sureties on a bond, conditioned for the erection in accordance with certain plans and specifications, and keeping in repair of bridge abutments, were released from liability by a change in the plans of the work made by the principals and accepted by the obligee of the bond without their knowledge or consent. In the opinion it is said, "the specification as to the west abutment, which is the one that fell, is that it shall be 7 x 20 feet at the base; 3 x 16 feet at the top; 26 feet high, and containing 90 cubic yards. It is definite as to dimensions and form, and calls for a four-sided structure, sloping in presumably on all sides. The structure actually erected and accepted by the plaintiff had wing walls at the ends, the stone of which were interlocked with those of the main part of the abutment. The bond executed by the defendants requires them to keep the work in repair." It was held that to repair such a work was not the same thing as to repair the abutment of the form and dimensions specified in the contract.

43 In Beers v. Wolf, 116 Mo., 187, there was a change of six in. in the depth of the basement, and in the depth of the closets, and these changes made an additional cost in plastering alone of $221.61. The change in the depth of the basement added the cost of a bulkhead to secure sewer connection, and there was a different arrangement of the closets. The primary work was an addition to a hotel, at the price of $31,070. The sureties were released.

In Erickson v. Brandt (Minn.), 55 N. W., 62, it was held that the sureties on a bond of indemnity against liens arising in the course of construction of a building under a contract between the owner and contractor, were released by a departure from the plans and specifications involving different materials and additional labor, which are included in the lien claims.

In Whitcher v. Hall, 5 B. & C., 269 (11 Eng. Com. Law, 225), the surety engaged for another to the plaintiff, for the milking of thirty cows, at a given price each per annum; subsequently an agreement was concluded without the surety's consent, whereby the hirer was to have twenty-eight cows for one-half the year, and thirty-two for the remainder, and it was held that the surety was released.

Pursuant to the foregoing views the demurrer must be sustained.

EDWARD B. THOMAS, *U. S. J.*

44 At a stated term of the circuit court of the United States of America for the eastern district of New York, in the second judicial

circuit, held at the United States court rooms in the borough of Brooklyn, on the 24th day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

Present the Honorable Edward B. Thomas, district judge, holding the court.

UNITED STATES OF AMERICA
against
JOHN GILLIES, HENRY HAMILTON, HUGH MCROBERTS and Catharine Freel, Edward J. Freel and Frank J. Freel, as executors of the last will and testament of Edward Freel, deceased.

The issue of law raised by the demurrer of the defendant, Edward J. Freel, as executor, to the amended complaint herein, coming on to be heard by the court at a stated term, held by the undersigned on the 3d day of January, 1899, and after hearing James R. Soley, esq., and Howard A. Taylor, esq., of counsel for said defendant Freel, as executor, in support of the demurrer, and George H. Pettit, esq., United States attorney for the eastern district of New York, and Robert H. Roy, esq., assistant United States attorney for said district, in opposition, and due deliberation being had thereon, and it having been found and
45 decided that said amended complaint fails to state facts sufficient to form a cause of action against said Edward J. Freel, as executor, it is

Ordered that said demurrer be sustained and said amended complaint herein as to the defendant, Edward J. Freel, as executor, etc., be dismissed; and that said defendant have leave forthwith to enter final judgment thereon to such effect as aforesaid.

EDWARD B. THOMAS, *U. S. J.*

(Endorsed:) Order. Filed and entered May 24, 1899.

46 United States circuit court for the eastern district of New York.

UNITED STATES OF AMERICA
against
JOHN GILLIES, HENRY HAMILTON, Hugh McRoberts, and Catharine Freel, Edward J. Freel, and Frank J. Freel, as executors of the last will and testament of Edward Freel, deceased.

Final judgment on demurrer.

This action having been regularly brought on for trial upon the issues of law formed by the plantiff's amended complaint and by the demurrer of the defendant, Edward J. Freel, as executor, at a stated term of this court, held by the honorable Edward B. Thomas, district judge, who, having heard the parties by their counsel, and, after due deliberation, has duly made and filed an order in writing directing final judgment to be entered to the following effect: Now, on motion of Tracy, Boardman & Platt, attorneys for said defendant, it is

Adjudged and decreed that said demurrer is sustained and the amended complaint herein as to said defendant, Edward J. Freel, as executor, is dismissed.

By the court,

B. LINCOLN BENEDICT, *Clerk.*

Dated, Brooklyn, New York, May 24, 1899.

(Endorsed:) Final judgment on demurrer. Filed and entered May 24, 1899.

47 United States circuit court, eastern district of New York.

UNITED STATES OF AMERICA, PLAINTIFF in error,
vs.
EDWARD J. FREEL, AS EXECUTOR OF THE last will and testament of Edward Freel, deceased, impleaded with John Gillies and others, defendant in error.

The United States of America, plaintiff in the above-entitled cause, feeling aggrieved by the judgment of the court entered in the above-entitled action on the 24th day of May, 1899, now comes, by George H. Pettit, the United States attorney for the eastern district of New York, its attorney herein, and petitions the said court for an order allowing the said plaintiff to prosecute a writ of error to the honorable the United States circuit court of appeals for the second circuit, under and according to the laws of the United States in that behalf made and provided.

GEORGE H. PETTIT,
United States Attorney for the Eastern District of New York,
Attorney for Plaintiff,
Post-Office Building, Borough of Brooklyn, New York City.

And now, to wit, on the 26th day of July, 1899, it is ordered that the writ as prayed for be allowed.

EDWARD B. THOMAS, *U. S. J.*

(Endorsed:) Petition for writ of error. Filed July 27, 1899.

48 United States circuit court, eastern district of New York.

UNITED STATES OF AMERICA, PLAINTIFF in error,
vs.
EDWARD J. FREEL, AS EXECUTOR OF THE last will and testament of Edward Freel, deceased, impleaded with John Gillies and others, defendant in error.

Assignment of errors.

The above-named plaintiff in error hereby makes the following assignment of errors in the above-entitled action:

That the court erred:

First. In sustaining the demurrer interposed by the defendant, Edward J. Freel, as executor of the last will and testament of Edward Freel,

deceased, to the amended complaint filed in the said action, and by holding and deciding that the facts stated in the said amended complaint were not sufficient to constitute a cause of action, as against said defendant, Edward J. Freel, as executor, as aforesaid.

Second. In holding that the change made by the supplemental contract, set forth in the complaint, dated June 16th, 1893, enlarging the dry dock, was not authorized by the seventh article of the original contract, dated November 17th, 1892, set forth in the said complaint, as respects the
49 testator, Edward Freel, one of the sureties given by John Gillies, the contractor, for the faithful performance of said contract described in said complaint.

Third. In holding that the changes made by the supplemental contract, dated August 17th, 1893, changing the location of the said dry dock sixty-four feet inland, was not authorized by the seventh article of the original contract, dated November 17th, 1892, set forth in the said complaint, as against the testator, Edward Freel, one of the sureties given by John Gillies, the contractor, for the faithful performance of said contract, described in said complaint.

Fourth. In holding that the change made by the said supplemental contracts, set forth in the said complaint, changing the dimensions of said dry dock, as specified in the said original contract, and changing the location of the same, were, respectively, changes in the original contract itself, and not such changes in the plans and specifications accompanying the same, as were authorized by the seventh article of the said original contract, as against the sureties on said bond.

Fifth. In holding that the changes provided for in said two supplemental contracts were material alterations and modifications of the original contract, and therefore released the sureties, on the bond given for the faithful performance of the contract, from all liability on their said bond.

Sixth. In holding that the said original contract was affected and changed by the alteration or location of the dry dock provided for in the said supplemental contracts mentioned in said complaint, and in not holding that said alteration and change of location was merely an alteration of the plans and specifications, and not of said original contract itself.

Seventh. In holding that the extension of time allowed said con-
50 tractor within which to complete the original contract, according to the changes and modifications made in the plans and specifications accompanying the same by said supplemental contracts, affected the liability of the sureties on said bond.

Eighth. In not holding that by article seventh of the original contract, mentioned and described in the said complaint, the extension of said dry dock and the change of location of the same, as provided for in the said two supplemental contracts, were authorized by the said seventh article of said original contract.

Ninth. In not holding that by the provision contained in article seventh of the said original contract, which reads: "And further provided that no change herein provided for shall in any manner affect the validity of this contract," the sureties were apprised and notified beforehand of all changes which the parties might thereafter make in said original contract, and that the said sureties thereby agreed for themselves, respec-

tively, to be bound by such changes as should thereafter be made in said contract, according to the methods therein provided for.

Tenth. In not holding that the sureties on the bond given for the faithful performance of said original contract of said John Gillies, were liable for the faithful performance of the same as changed by the said supplemental contracts of July 16th, 1893, and August 17th, 1893.

GEORGE H. PETTIT,
U. S. Attorney and Attorney for Plaintiff in Error,
Post-Office Building, Borough of Brooklyn, New York City.

(Endorsed:) Assignment of errors. Filed July 27, 1899.

51 UNITED STATES OF AMERICA,
Eastern District of New York, ss.

I, B. Lincoln Benedict, clerk of the circuit court of the United States for the eastern district of New York, do hereby certify that the foregoing is a true transcript of the amended complaint, demurrer, opinion, orders, and papers on appeal made up to be transmitted to the United States circuit court of appeals for the second circuit, in the case of the United States of America against Edward J. Freel, as executor, etc., impleaded.

In witness whereof I have hereunto set my hand and the seal of this court the 28th day of July, 1899.

[SEAL.] B. LINCOLN BENEDICT, *Clerk.*

52 UNITED STATES OF AMERICA, *ss.*

The President of the United States, to the honorable the judges of the circuit court of the United States for the eastern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said circuit court, before you, or some of you, between the United States of America, plaintiff in error, and Edward J. Freel, as executor of the last will and testament of Edward Freel, deceased, impleaded with John Gillies and others, defendant in error, a manifest error hath happened, to the great damage of the said United States of America, plaintiff in error, as by their complaint appears.

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the second circuit, together with this writ, so that you have the same at the city of New York, in the State of New York, on the 8th day of Aug., 1899, in the said circuit court of appeals, to be then and there held, that the record and proceedings aforesaid, being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the borough of Brooklyn,
53 city of New York, the 26th day of July, in the year of our Lord one thousand eight hundred and ninety-nine.

[SEAL.] B. LINCOLN BENEDICT, *Clerk.*

Allowed:

EDWARD B. THOMAS, *U. S. J.*

(Endorsed:) United States circuit court, eastern district of New York. United States of America, plaintiff in error, v. Edward J. Freel, as executor, &c., defendant in error. Writ of error. George H. Pettit, United States attorney and attorney for plaintiff, post-office building, Borough of Brooklyn. Service of within writ of error and receipt of copy thereof is hereby admitted this 27th day of July, 1899. Tracy, Boardman & Platt, attys. for deft. Received and filed July 27, 1899.

54 The President of the United States of America to Edward J. Freel, as executor of the last will and testament of Edward Freel, deceased, impleaded with John Gillies and others, and Messrs. Tracy, Boardman & Platt, his attorneys, greeting:

You are hereby cited and admonished to be and appear at the United States circuit court of appeals for the second circuit, to be held at the city of New York, in the State of New York, on the 8th day of August, 1899, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the eastern district of New York, wherein the United States of America is the plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the party in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at the Borough of Brooklyn, city of New York, this 26th day of July, 1899.

EDWARD B. THOMAS, *U. S. J.*

(Endorsed:) United States circuit court, eastern district of New York. United States of America, plaintiff in error, v. Edward J. Freel, as executor, &c., defendant in error. Citation on appeal. George H. Pettit, United States attorney and attorney for plaintiff, post-office building, Borough of Brooklyn. Service of within citation on appeal and receipt of a copy thereof is hereby admitted this 27th day of July, 1899. Tracy, Boardman & Platt, attys. for deft. Received and filed July 27, 1899.

55 United States circuit court of appeals for the second circuit, October term, 1899.

Submitted December 5, 1899. Decided January 5, 1900.

THE UNITED STATES, PLAINTIFF in error, *vs.* EDWARD J. FREEL, AS EXECUTOR, etc., defendant in error.	No. 78. Error to the circuit court of the United States for the eastern district of New York.

Before Judges Wallace, Lacombe, and Shipman.

Wallace, Circuit Judge. This is a writ of error by the plaintiff in the court below to review a judgment for the defendant Freel, as executor of Edward J. Freel, entered upon a demurrer to the complaint. The action

was brought to recover upon a bond executed to the plaintiff by Edward J. Freel as surety for one Gillies, whereby Freel as such surety undertook that Gillies would well and truly perform the stipulations of a contract of even date therewith. It was averred in the complaint that Gillies entered upon the performance of the contract, but thereafter failed and neglected to fulfill it, to the damage of the plaintiff.

The contract referred to in the bond and bearing the same date was executed by Gillies as party of the first part and the United States as party of the second part, and was one by which Gillies undertook to construct a dry dock for the United States at the price of $412,000. The contract contained, among others, the following clauses:

"First. The contractor will, within twenty days after he has
56 been tendered the possession and the occupancy of the site by the party of the second part, commence, and within twenty-seven calendar months from such date construct and complete, ready to receive vessels, a timber dry dock to be located at such place on the water line of the navy-yard, Brooklyn, N. Y., as shall be designated by the party of the second part."

"Seventh. The construction of the said dry dock and its accessories and appurtenances herein contracted for shall conform in all respects to and with the plans and specifications aforesaid, which plans and specifications are hereto annexed and shall be deemed and taken as forming a part of this contract with the like operation and effect as if the same were incorporated herein. No omission of the plans or specifications of any detail, object, or provision necessary to carry this contract into full and complete effect, in accordance with the true intent and meaning hereof, shall operate to the disadvantage of the United States, but the same shall be satisfactorily supplied, performed, and observed by the contractor, and all claims for extra compensation by reason of or for or on account of such extra performance are hereby, and in consideration of the premises, expressly waived; and it is hereby further provided, and this contract is upon the express condition, that the said plans and specifications shall not be changed in any respect except upon the written order of the Bureau of Yards and Docks; and that if at any time it shall be found advantageous or necessary to make any change, alteration, or modification in the aforesaid plans and specifications, such change, alteration, or modification must be agreed upon in writing by the parties to the contract, the agreement to set forth fully the reasons for such change, and the nature thereof, and the increased or diminished compensation, based upon the estimated actual cost thereof which the contractor shall receive, if any: Provided, that whenever the said changes or alterations would increase or decrease the cost by a sum exceeding five hundred dollars ($500) the actual cost thereof shall be ascertained, estimated, and determined by a board of naval officers to be appointed by the Secre-
57 tary of the Navy for the purpose, and the contractor shall be bound by the determination of said board, or a majority thereof, as to the amount of increased or diminished compensation he shall be entitled to receive in consequence of such change or changes: Provided further, that if any enlargement or increase of dimensions shall be ordered by the Secretary of the Navy during the construction of said dry dock, that the actual cost thereof shall be ascertained, estimated, and determined by a

board of naval officers, to be appointed by the Secretary of the Navy, who shall revise said estimate and determine the sum or sums to be paid the contractor for the additional work that may be required under this contract: And provided also, that no further payment shall be made unless such supplemental or modified agreement shall have been signed before the obligation arising from such change or modification was incurred and until after its approval by the party of the second part: And further provided, that no change herein provided for shall in any manner affect the validity of this contract."

June 16, 1893, a supplemental contract was entered into between Gillies and the United States to lengthen the dry dock from 600 feet, as called for in the specification, to 670 feet. It provided for additional compensation to the contractor of $45,556.

August 17, 1893, a second supplemental contract was entered into between Gillies and the United States. By this contract "the location of the dry dock now being constructed at the United States navy-yard at Brooklyn, N. Y., under contract with the said John Gillies, party of the first part," was changed, and Gillies stipulated to change its location to one sixty-four feet further inland "than that laid down and staked out when the said contract was entered into," and to perform all the additional excavation necessary and supply all the labor and materials incident thereto. By this contract he was to be paid the sum of $5,063.83 as full compensation for the additional work and materials. Freel was not a party to either of the supplementary contracts.

58 The demurrer of the defendant was sustained in the court below upon the ground that Freel was discharged from his obligation as surety for the performance of the contract by the change introduced by the supplementary contract of August 17, 1893, whereby a new location for the dry dock was substituted for the contract location. The very careful and exhaustive opinion of the learned judge who decided the case in the court below renders unnecessary any extended discussion of the questions presented by this appeal.

By the first contract the site of the dry dock was to be on the water line, at some point to be thereafter designated. Its location was to that extent definitely fixed. It was the purpose and purport of the last agreement to change the original location, which was to be "at such a place on the water line" as might be designated by the United States to a place not on the water line, but "sixty-four feet further inland." This change necessarily entailed an increased expense upon the contractor, as was recognized by the extra compensation allowed in the agreement. That it altered the requirements of the first contract in matters of substance is self-evident.

The proposition is elementary that the obligation of a surety does not extend beyond the terms of his undertaking, and when this undertaking is one to assure the performance of an existing contract, if any change is made in the requirements of such contract in matters of substance, without his assent, his liability is extinguished. This proposition is not controverted in the argument for the plaintiff in error, but the contention is that the change which was made in the requirements of the principal contract was within the contemplation of that contract, and therefore was sanctioned by the undertaking of the surety. If the provisions of the principal contract authorized such a change, undeniably the surety assented to it in

advance. The case is reduced to the single question whether the principal contract did authorize the change. This inquiry depends upon the effect of the seventh clause. The most that can be claimed for
59 that clause is that it permits the party of the second part to make any change, alteration, or modification "in the agreement, plans, and specifications," which are referred to as "annexed" and made a part of the contract, and provides that no such change shall in any manner affect the validity of the contract. Whether the clause warrants such a latitudinarian construction as to embrace the extensive departure from the plans and specifications provided for by the first supplemental contract, we do not determine; we are clear that it does not warrant the change made by the last supplemental contract, and that being so, whether the first change was authorized is a question which does not require decision. The plans and specifications mentioned in clause seven are not set forth in the complaint, and we can not doubt they would have been if they purported in the remotest degree to deal with the location of the site. The context shows, however, that the plans and specifications mentioned in the clause are those which relate to the construction of the building, its accessories, and appurtenances.

The supplemental contract does not purport to make any change in the plans and specifications annexed to the original contract. It recites that the location had been "laid down and staked out" when that contract was entered into; and if the location had been shown or referred to in the plans or specifications that recital would have been unnecessary, and one referring to the plans would naturally have been inserted instead.

Undoubtedly it would have been within the contemplation of the original contract to change the location of the dry dock from the place originally laid down and staked out to any other place upon the water line of the navy-yard, which might have been thereafter designated by the United States. The terms of the contract would have warranted such a change, because they provide for the construction of a dry dock at such place on the water line of the navy-yard "as shall be designated" by the United States. Such a change would not have required the "additional
60 excavation necessary at the entrance" mentioned in the supplemental contract and the very considerable incidental extra expense.

We agree with the court below that the alteration extinguished the liability of the surety. The demurrer was correctly decided, and the judgment is affirmed.

George H. Pettitt, for the plaintiff in error.

Howard A. Taylor and James R. Soley, for the defendant in error.

61 At a stated term of the United States circuit court of appeals, in and for the second circuit, held at the court rooms in the post-office building in the city of New York, on the 15th day of January, one thousand nine hundred.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, Hon. Nathaniel Shipman, circuit judges.

UNITED STATES, PLAINTIFF IN ERROR, *vs.* EDWARD J. FREEL, AS EXECUTOR, ETC., defendant in error.	Error to the circuit court of the United States for the eastern district of New York.

This cause came on to be heard on the transcript of record from the circuit court of the United States for the eastern district of New York, and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the judgment of said circuit court be, and it hereby is, affirmed. It is further ordered that a mandate issue to the said circuit court in accordance with this decree.

62 (Endorsed:) United States circuit court of appeals, second circuit. United States *vs.* Edw. J. Freel, as Exr. Order for mandate. United States circuit court of appeals, second circuit. Filed Jan. 20, 1900. William Parkin, clerk.

63 Supreme Court of the United States.

THE UNITED STATES OF AMERICA, PLAINTIFF in error,
vs.
EDWARD J. FREEL, AS EXECUTOR OF THE LAST will and testament of Edward Freel, deceased, impleaded with John Gillies and others, defendant in error.

To the Honorable RUFUS W. PECKHAM,
Justice Supreme Court of the United States:

The United States of America, the plaintiff in error in the above-named cause, feeling aggrieved by the judgment of the United States circuit court of appeals for the second circuit, filed and entered in the above-entitled action, in the office of the clerk of said circuit court of appeals, on the twentieth (20) day of January, A. D. nineteen hundred, now comes, by George H. Pettitt, the United States attorney for the eastern district of New York, the attorney of the United States of America herein, and petitions the said Supreme Court for an order allowing the said plaintiff to prosecute a writ of error to the honorable, the Supreme Court of the United States, under and according to the laws of the United States in that behalf made and provided.

(Signed) GEORGE H. PETTITT,
United States Attorney for the Eastern District of New York, Attorney for Plaintiff in Error, Federal Building, Borough of Brooklyn, New York.

And now, to wit, on the 22nd day of Dec., A. D. nineteen hundred, it is ordered that the writ as prayed for be allowed. Dated Dec. 22, 1900.

(Signed) R. W. PECKHAM,
Jus. Sup. Ct., U. S.

64 (Endorsed:) Supreme Court of the United States. United States of America, plaintiff in error, *vs.* Edward J. Freel, as executor of the last will and testament of Edward Freel, deceased, impleaded with John Gillies and others, defendants in error. Petition for writ of error. George H. Pettitt, United States attorney for the eastern district of New York and attorney for plaintiff in error. Federal Building, borough of Brooklyn. United States circuit court of appeals, second circuit. Filed Dec. 31, 1900. William Parkin, clerk.

65 Supreme Court of the United States.

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
EDWARD J. FREEL, AS EXECUTOR OF THE LAST will and testament of Edward Freel, deceased, impleaded with John Gillies and others, defendant in error.

Assignment of errors.

The above-named plaintiff in error hereby makes the following assignment of errors in the above-entitled action:

That the court erred:

First. In affirming the judgment of the United States circuit court for the eastern district of New York, sustaining the demurrers interposed by the defendant, Edward J. Freel, as executor of the last will and testament of Edward Freel, deceased, to the amended complaint filed in the said action, and by holding and deciding that the facts stated in the said amended complaint were not sufficient to constitute a cause of action as against the defendant, Edward J. Freel, as executor, as aforesaid.

Second. In affirming the judgment of the United States circuit court for the eastern district of New York, holding that the change made by the supplemental contract set forth in the complaint, dated June 16th, 1893, enlarging the dry dock was not authorized by the seventh article of the original contract dated November 17th, 1892, set forth in the said complaint as respects the testator, Edward Freel, one of the sureties given by John Gillies, the contractor, for the faithful performance
66 of said contract, described in said complaint, and in affirming the judgment of said United States circuit court for the eastern district of New York herein.

Third. In affirming the judgment of said United States circuit court for the eastern district of New York, holding that the changes made by the supplemental contract, dated August 17th, 1893, changing the location of the said dry dock sixty-four feet inland, was not authorized by the seventh article of the original contract, dated November 17th, 1892, set forth in the complaint, as against the testator, Edward Freel, one of the sureties given by John Gillies, the contractor, for the faithful performance of said contract, described in said complaint.

Fourth. In affirming the judgment of the United States circuit court for the eastern district of New York, holding that the change made by the said supplemental contracts, set forth in the said complaint, changing

the dimension of said dry dock as specified in the said original contract, and changing the location of the same, were, respectively, changes in the original contract itself, and not such changes in the plans and specifications accompanying the same as were authorized by the seventh article of the said original contract, as against the sureties on said bond.

Fifth. In affirming the judgment of the United States circuit court for the eastern district of New York, holding that the changes provided for in said two supplemental contracts were material alterations and modifications of the original contract, and therefore released the sureties on the bond given for the faithful performance of the contract, from all liability on their said bond.

67 Sixth. In affirming the judgment of the United States circuit court for the eastern district of New York, holding that the said original contract was affected and changed by the alteration or location of the dry dock provided for in the said supplemental contracts mentioned in said complaint, and in not holding that said alteration and change of location was merely an alteration of the plans and specifications, and not of said original contract itself.

Seventh. In affirming the judgment of the United States circuit court for the eastern district of New York, holding that the extension of time allowed said contractor within which to complete the original contract, according to the changes and modifications made in the plans and specifications accompanying the same, by said supplemental contracts, affected the liability of the sureties on said bond.

Eighth. In not reversing the said judgment of the said United States circuit court for the eastern district of New York, holding that by article seventh of the original contract, mentioned and described in the said complaint, the extension of said dry dock and the change of location of the same, as provided for in the said two supplemental contracts, were authorized by the said seventh article of said original contract.

Ninth. In not reversing the said judgment of the said United States circuit court for the eastern district of New York, holding that by the provision contained in article seventh of the said original contract, which reads, "And further provided that no change herein provided for shall, in any manner, affect the validity of this contract," the sureties were apprised and notified beforehand of all changes which the parties might thereafter make in said original contract, and that the said sureties

68 thereby agreed for themselves, respectively, to be bound by such changes as should thereafter be made in said contract, according to the methods therein provided for.

Tenth. In not holding that the sureties on the bond given for the faithful performance of said original contract of said John Gillies were liable for the faithful performance of the same, as changed by the said supplemental contracts of July 16th, 1893, and August 17th, 1893.

Eleventh. In not reversing the judgment of the said United States circuit court for the eastern district of New York and overruling the demurrer of the said defendant herein, and rendering judgment for the plaintiff herein, according to the prayer of the complaint herein.

(Signed) GEORGE H. PETTITT,

United States Attorney for the Eastern District of New York, and Attorney for Plaintiff in Error, Federal Building, Borough of Brooklyn, New York City.

(Endorsed:) Supreme Court of the United States. United States of America, plaintiff in error, *vs.* Edward J. Freel, as executor of the last will and testament of Edward Freel, deceased, impleaded with John Gillies and others, defendant in error. Assignment of errors. George H. Pettitt, United States attorney for the eastern district of New York, and attorney for plaintiff in error. Federal Building, borough of Brooklyn. United States circuit court of appeals, second circuit. Filed Dec. 31, 1900. William Parkin, clerk.

69 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 68 inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of United States, plaintiff in error, against Edward J. Freel, executor, etc., impleaded, defendant in error, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 3rd day of January, in the year of our Lord one thousand nine hundred and one and of the independence of the United States the one hundred and twenty-fifth.

[SEAL.] WM. PARKIN, *Clerk.*

70 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judges of the United States circuit court of appeals for the second circuit, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals for the second circuit, before you, or some of you, between the United States of America, plaintiff in error, and Edward J. Freel, as executor of the last will and testament of Edward Freel, deceased, impleaded with John Gillies and others, defendant in error, a manifest error hath happened, to the great damage of the said the United States of America, plaintiff in error, as by its complaint appears. We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 22d day of December, in the year of our Lord one thousand nine hundred.

[SEAL.] JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

71 UNITED STATES OF AMERICA, *ss:*

To Edward J. Freel, as executor of the last will and testament of Edward Freel, deceased, impleaded with John Gillies and others, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the second circuit, wherein the United States of America is the plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, this 22d day of December, in the year of our Lord one thousand nine hundred.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

72 On this twenty-ninth day of December, in the year of our Lord one thousand nine hundred, personally appeared Lloyd M. Howell before me, the subscriber, U. S. commissioner for the eastern district of N. Y., and makes oath that he delivered a true copy of the within citation to James R. Soley, one of the members of the firm of Tracy, Boardman & Platt, attorneys for Edward J. Freel, as executor of the last will and testament of Edward Freel, deceased, impleaded with others, at the office of said firm, No. 35 Wall st., on December 27th, 1900.

LLOYD M. HOWELL.

Sworn to and subscribed the 29 day of December, A. D. 1900.

[SEAL] B. LINCOLN BENEDICT,
U. S. Comr.

Copy received Dec. 27, 1900. Tracy, Boardman & Platt, per W. F. Wood.

UNITED STATES OF AMERICA,
Eastern District of New York, ss:

Lloyd M. Howell, being duly sworn, says that he is an assistant to the United States attorney in the eastern district of New York; that he is over the age of twenty-one years; that on the twenty-eighth day of

December, in the year 1900, at number 333 Clinton avenue, in the borough of Brooklyn, in the eastern district of New York, he served the within citation upon Edward J. Freel, the executor of Edward Freel, deceased, by delivering to and leaving with said Edward J. Freel, personally, at the time and place aforesaid, a true copy of the within citation. Deponent further says that he knows the person served as aforesaid to be Edward J. Freel, the person mentioned and described in said citation, and the person to whom the said citation is directed.

LLOYD M. HOWELL.

Subscribed and sworn to before me this 29th Dec., 1900.

[SEAL] B. LINCOLN BENEDICT,
U. S. Comr.

73 (Indorsement on cover:) File No. 18016. U. S. C. C. of appeals, 2nd circuit. Term No. 224. The United States, plaintiff in error, vs. Edward J. Freel as executor of the last will and testament of Edward Freel, deceased. Filed January 10th, 1901.

O

No. 224.

Brf. of Atty. Gen (Mr. Gorman) for P. E.

Office Supreme Court U. S.
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Filed April 5, 1902.

In the Supreme Court of the United States.

THE UNITED STATES, PLAINTIFFS IN ERROR,
v.
EDWARD J. FREEL, AS EXECUTOR OF THE last will and testament of Edward Freel, deceased. } No. 224.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF THE PLAINTIFFS IN ERROR.

L. A. PRADT,
Assistant Attorney-General.
GEORGE HINES GORMAN,
Special Attorney.

In the Supreme Court of the United States.

THE UNITED STATES, PLAINTIFFS IN ERROR,
v.
EDWARD J. FREEL, AS EXECUTOR OF THE last will and testament of Edward Freel, deceased. } No. 224.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF ON BEHALF OF THE PLAINTIFFS IN ERROR.

STATEMENT.

This is a writ of error sued out from this court to the circuit court of appeals for the second circuit, wherein is sought a review of the decision of that court affirming a decision of the circuit court of the United States for the eastern district of New York. The plaintiffs in error filed their complaint in a certain action at law in the said circuit court for the eastern district of New York, wherein recovery was sought for damages against the defendant in error as surety upon the bond of one John Gillies for the construction of a certain timber dry dock located in the navy-yard at Brooklyn, N. Y. The complaint (Record, pp. 1 to 12) set out the original contract, together with two supplemental contracts made between the United States and

John Gillies, and pleaded the substance of the bond of the defendant's testate given for the faithful performance of said contract (Transcript, p. 2), alleging failure of performance and praying for damages.

To this complaint the defendant in error filed a general demurrer (Transcript, p. 13), upon the ground that the complaint did not state facts sufficient to constitute a cause of action.

The demurrer of the defendant in error was sustained by the circuit court of the United States for the eastern district of New York in an opinion by Judge Thomas (Record pp. 13 to 23), wherein it was held that while the supplemental contract of June 16, 1893, was not such a change of the original contract as would release the surety, yet that the contract of August 17, 1893, was such change of the original contract as would produce that result. Upon appeal being taken from this decision to the circuit court of appeals for the second circuit, the decision of the lower court was affirmed upon the same grounds in an opinion by Judge Wallace. (Record, pp. 28 to 31.)

From this decision of the circuit court of appeals a writ of error was sued out in this court (Transcript, p. 35), and the case is accordingly here for review.

I.

THE SUPPLEMENTAL CONTRACT OF AUGUST 17, 1893, WAS NOT, AS A MATTER OF FACT, A CHANGE IN THE ORIGINAL CONTRACT FOR THE CONSTRUCTION OF THIS DRY DOCK EITHER IN LOCATION OF THE SITE OR IN CHARACTER OF CONSTRUCTION.

The supplemental contract of June 16, 1893 (Transcript, p. 10), is not involved here. The circuit court

held that this supplemental agreement was justified by the terms of the original contract, and that it was not such a change in the original contract as released the sureties. The circuit court of appeals of course did not pass (Transcript, p. 31, folio 59) upon that question, because it was not before them, inasmuch as no cross appeal was taken to that court by the defendant in error, and for the same reason the correctness of the decision of the circuit court upon that question is not here open for review. We are therefore confined to a consideration of the effect of the supplemental agreement of August 17, 1893. (Transcript, pp. 11 and 12.) By the terms of this supplemental agreement the table end or entrance of the dock was set back 64 feet farther from the river than had been tentatively laid down and staked out when the original contract was entered into, and likewise provides that the contractor will perform the necessary additional excavation at and for the increased compensation of $5,063.18. The circuit court and the circuit court of appeals were both of the opinion that by this supplemental contract the original contract had been departed from in that by setting the table end, or entrance, of the dock 64 feet back from the river, the provisions of the original contract wherein it was provided that the dock was to "be located at such place on the water line of the navy-yard, Brooklyn, N. Y., as shall be designated by the party of the second part," had been violated; in other words, both courts were of opinion that a dock, the entrance of which was located 64 feet from the river, was not located upon the water line, and that therefore there had been

such a change in the location of the dock, and such a departure from the provisions of the original contract, as would release the surety from his obligation.

It will be observed that by the terms of the original agreement this dock had not been definitely located at all, except that it was to be constructed somewhere along the water line in the navy-yard at Brooklyn, N.Y., and that the precise point was to be thereafter designated by the United States. It was admitted by both courts below that the Government might at will have changed the projected site of this dock indefinitely, above or below the site at which it was originally contemplated to build it, so long as it was builded upon the water line. For instance, on page 31 of the transcript the circuit court of appeals said:

> Undoubtedly it would have been within the contemplation of the original contract to change the location of the dry dock from the place originally laid down and staked out to any other place upon the water line of the navy-yard which might have been thereafter designated by the United States. The terms of the contract would have warranted such change, because they provide for the construction of a dry dock at such place on the water line of the navy-yard as shall be designated by the United States.

The whole question here involved, therefore, resolves itself into a determination of whether a dock located 64 feet from the actual water in the river is located along or upon the water line of the Brooklyn navy-yard. What is meant by the water line? Manifestly, it

means the water front. The water line, as a place of designation, is indefinite in the extreme. If high water is meant, then the line would be at one place; and if low water is meant, it would be at another. Manifestly, the employment of such words was not intended by the contracting parties to mean that the dock was to be built in immediate juxtaposition to the actual water in the river, but that it should be built at such reasonable distance from the actual water as was found to be expedient, economical, convenient, useful, or necessary, taking into consideration all of the surrounding circumstances, the conditions of the underlying soil into which the pit was to be dug, the sinuosities of the river at the point selected, the location of other docks, buildings, or improvements in the navy-yard, etc. Such was the interpretation given to precisely similar words in a contract to build a dry dock immediately adjacent to the one now under consideration, in the case of *Simpson* v. *United States* (31 C. Cls. R., 217, at p. 241), which was affirmed by this court in 172 U. S., at page 372. In that case the contract provided (31 C. Cls. R., at p. 223) that the contractors should construct a timber dry dock, "to be located at such place on the water line of the navy-yard, Brooklyn, N. Y., as shall be designated by the party of the second part;" and in the specifications (31 C. Cls. R., at p. 231) it was provided that the dock should be built "upon an available site to be provided by the Government;" and the question arose upon the construction of these two provisions taken together. The Court of

Claims, speaking through Judge Davis (at p. 241), said:

> The main facts are that this dock was to be built within a relatively limited area of the navy-yard upon an available site upon the water line; that is, a site available in that yard and available primarily for naval purposes, which may be understood to be a site *near* the water, so as to provide short lockage; a site presenting such an entrance as would least be affected by prevailing strong wind and the sharp running tide of the East River; and, finally, such a site (the other conditions being protected) as would be reasonably near the foundries and workshops of the yard.

One of the principal considerations affecting the precise location of a stupendous work of this character is the character of the soil underlying the site selected, whether hard or firm, stable or unstable, of natural or artificial creation, and whether the same be porous so as to admit of the percolation of water from the river in such wise as to escape into the body of the pit during the progress of the work. When a dry dock is to be built it must either be located at a sufficient distance from the river to enable the bank of earth between the entrance or table end of the dock and the river to permit a natural cofferdam, or else an artificial cofferdam must be built at enormous expense and delay. The water from the river must be kept out of the pit during the progress of the work in some way, and it can only be done either by leaving an intervening

space of earth or else by the construction of an artificial cofferdam for that purpose.

The width of the intervening space of earth between the entrance of the dry dock and the water in the river must, of course, depend upon the character of the soil. If the soil is of a very firm, compact, or cohesive character, such as clay, then, of course, the strip of earth between the excavation and the river would be much smaller than in a case where the soil was of a marshy or porous character admitting of the free percolation of water. Now it was proposed in the case at bar to build this dock by leaving a space of earth between the pit and the river so as to form a natural cofferdam, and thus prevent the great expense and delay of building an artificial cofferdam for this purpose, and likewise to locate the table end of the dock at a point sufficiently back from the river to secure firm land to support the gates at the entrance of the dock. The parties to this contract, including the surety, knew full well that the soil in the navy-yard at Brooklyn was of an artificial character, having been made by the dumpings from the city—what is known as filled or made soil; that it was originally a bay, and that hence all of the soil there was of a very soft and porous character, containing fine mica and silica, which, when mixed with water, become quicksand, and this court will take judicial notice of these facts from its own records. (See record in the case of *Simpson* v. *United States*, No. 51, October term, 1898; also p. 377 of 172 U. S.; likewise the findings of fact made by the Court of Claims

in the case of *Simpson* v. *United States*, 31 C. Cls., 217, at pp. 233 and 234). Knowing these facts, therefore, the contractor and his surety, at the time that they entered into the contract to build this dock upon the water line at Brooklyn Navy-Yard, knew very well that it was a physical impossibility to build the dock immediately adjacent to the water, and that its entrance or table end would have to be set back a sufficient distance to prevent the water from flowing into the pit during the progress of construction and to afford a firm support to the gates at the entrance of the dock. Just how far this would be, of course, only time and experience could demonstrate, since the character of this soil is so treacherous that it could not be ascertained by soundings or borings; and it was for this reason that the precise location of this dock was not determined upon in the original contract, and was left to the future determination of the United States by providing that the dock should be "located at such place on the water line of the navy-yard, Brooklyn, N. Y., as shall be designated by the party of the second part."

It is impossible to conceive of a dry dock not being built along the water line. The Government would hardly commit the folly of building a dry dock, the purpose of which is to receive ships from the roadstead or harbor of the Brooklyn Navy-Yard, for the purpose of docking and repair, at any other place than along the water line. It is inconceivable, for instance, that they would go to the expense of build-

ing a ship canal between the river and the dry dock. If such a thing as that was in the case there would be some merit in the contention here made; but to say that a dock located 64 feet from the river—that is to say, which has a 64-foot entrance from the river—is not along the water line, seems to fall very little short of absurdity.

It is therefore submitted that in view of the fact that the precise location of this dock was not made at the time of the execution of the original contract, but was left to the future determination of the United States, the supplemental agreement of August 17, 1893, whereby the entrance or table end of the dock was located 64 feet from the river, was not, *as a matter of fact*, any change of location whatever, but was a mere future determination of what, under the contract, had hitherto remained inchoate and incomplete.

II.

IF THE SUPPLEMENTAL AGREEMENT OF AUGUST 17, 1893, IS TO BE REGARDED AS A CHANGE IN THE ORIGINAL CONTRACT, THEN IT IS SUCH CHANGE AS IS CONTEMPLATED BY THE CONTRACT ITSELF, AND THE SURETIES ARE STILL BOUND.

By the seventh article of the original contract (Rec., p. 6) it is provided that the dry dock shall conform in all respects with the plans and specifications annexed to the contract and made a part of it, but that if "at any time it shall be found advantageous or necessary to make any change, alteration, or modification in the aforesaid plans and specifications, such change, alteration, or modification must be in writing * * *

and provided that no change herein provided for shall in any manner affect the validity of this contract."

As was said in *Smith* v. *Molleson* (148 N. Y., 241):

> The contract guaranteed is by reference made a part of the bond, and therefore in order to determine the scope of the defendant's undertaking the two instruments must be read together.

As was said by this court in *Benjamin* v. *Hilliard* (23 How., at p. 164):

> The general rule is to attribute to the obligation of a surety the same extent as that of the principal. Unless from the terms of the contract an intention appears to reduce his liability within more narrow bounds, a restriction will not be imposed by construction contrary to the nature of the engagement. If the terms of his engagement are general and unrestricted and embrace the entire subject (*omnem causam*), his liability will be measured by that of the principal and embrace the same accessories and consequences (*connexorium et dependentium*). It will be presumed that he had in view the guaranty of the obligations his principal had assumed.

The obligation of the surety in this case is conditioned that the contractor "shall well and truly perform the stipulations of the contract of even date herewith, agreeing to construct a timber dry dock to be located at the navy-yard, Brooklyn, N. Y." It will be observed that this bond is general and unrestricted and embraces the entire subject, and the surety be-

comes liable by his obligation to see to it that the contractor performs in all respects and particulars the obligations which he assumed under the contract. This bond does not undertake to limit in any respect whatever the liability of the surety nor to contract that liability within narrower limits than the liability of the principal. It does not even stipulate that the dry dock to be built shall be upon the water line, but, on the contrary, obligates the surety to the erection of a dry dock in the navy-yard at Brooklyn, N. Y., in accordance with the contract, plans, and specifications.

So much has been said in the court below concerning the doctrine of *strictissimi juris* in its application to the obligations of sureties that it appears to have led to confusion of thought. That doctrine is not a doctrine of construction or interpretation, but one of application. The true rule of construction is well stated in *Gamble* v. *Cuneo* (21 App. Div. (N Y.), 413), as follows:

> The rule for construing the contract of the surety or guarantor should by no means be confounded with the rule that sureties and guarantors are favorites of the law and have a right to stand upon the strict terms of their obligations. There is no legal prohibition against entering into a contract of suretyship or guaranty. For any contract which it is legal to make it is legal that a surety or guarantor shall become responsible. In the construction of the contract of the surety or guarantor, as well as every other contract, the

> true question is what was the intention of the parties as disclosed by the instrument read in the light of the surrounding circumstances. To say that a certain set of words in a contract means one thing when the principal is defendant and that the same words in the same contract mean another thing simply because the defendant is a surety or guarantor is absurd.

Bearing in mind, therefore, the essential fact, that the obligation of the surety upon this contract is precisely the same as the obligation of the principal, let us briefly examine the provisions of the original contract viewed in the light of surrounding circumstances and gather therefrom the true intent and meaning of the obligation into which the contractor and his surety entered.

It was proposed by this contract to enter upon the construction of a great public work, involving an expenditure of some half a million dollars. However great the skill of the persons engaged upon this project, it was known to be beyond human foresight or ingenuity to provide for every possible contingency, difficulty, and obstruction that would inevitably be met with in so great an undertaking, particularly when it is remembered that such an enormous excavation of earth was to be had where the soil was almost entirely of a made character, surrounded on all sides by water, and where the soil was of an unknown and treacherous character. It was likewise known, of course, that as the work progressed experience or necessity might demonstrate not only the advisability, but the absolute

necessity, of departing from the plans and specifications originally promulgated. To meet this necessity the seventh article was incorporated into the contract for the purpose of supplying a just method of making such changes as might from time to time become necessary and of providing adequate compensation to the contractors for any increase of expense thereby occasioned It can not be doubted for a moment that it was the intention of the parties to this contract to provide by article 7 for such changes in the dock as might from time to time become necessary, nor can it be doubted that it was likewise their intention to provide that no change should impair in anywise the obligations of the contractor or his sureties. The language is that "no change herein provided for shall in any manner affect the validity of this contract." Those words are meaningless unless they refer to the obligation of the surety. A change in the original contract, reduced to writing and made in conformity with the form and procedure provided in the seventh article of the contract, could not possibly affect the validity of the contract as between the Government and the contractor, and the only possible meaning to be attributed to the words in the last clause of the seventh paragraph is an intent on the part of the contracting parties to likewise negative any idea that changes made in pursuance of this provision should in any wise release the obligation of the surety. And when this contract was perused by the surety, and the above-quoted language met with, can it be doubted that he

understood the words to mean that if such changes were subsequently contracted for and performed by the contractor he was to become the surety of such supplemental contract precisely in the same way that he was for the main contract? In the obligation into which he entered he makes no reservation or exception of his liabilities, but contracts in general and unrestricted terms to become the surety of Giles for the faithful performance of the contract of even date with said bond. By referring to the contract he has made the contract a part of his bond, and has thereby obligated himself to the faithful performance of the contract to build a dry dock in the navy-yard at Brooklyn, N. Y., either according to the original location, plans, contract, and specifications or in accordance with such modifications thereof as might from time to time be made between Giles and the United States. It is idle to talk in this connection of the doctrine of *strictissimi juris*. Parties may by their contracts enlarge their liabilities beyond that which the law would otherwise impose *either expressly or by fair implication*, and if they do so enlarge their liabilities by their own contracts the courts will not undertake to relieve them by any process of construction or interpretation, but will enforce the contract as the parties made it. (*The Sun Ptg. and Pub. Assn.* v. *Moore*, Sup. Ct. of the U. S., October term, 1901, No. 49, decided January 13, 1902, and cases cited.)

It is thoroughly well settled that where a contract makes provision for changes of location or character

of construction the surety is as much bound for the due performance of such changes as he was for the original undertaking. The case most similar to the one at bar is the case of *Wehr* v. *The German Lutheran Church* (47 Md., 177). This was an action upon a bond given for the faithful performance of a contract containing the following provision:

> Should the building committee appointed by said congregation desire to make any changes from the drawings and specifications at any time during the progress of the work the same shall be carried out by the said Seigman and Jones without making void or in any manner affecting this contract. Such changes, whether in addition to or deducted from the original work, shall be specified in writing signed by the contractor and the architects and the building committee, the sum to be fixed or allowed for such changes or alterations to be fixed and allowed by the architects and specified by the writing aforesaid.

It will be observed that the provision of this contract is practically identical with the provisions of the contract at bar. Certain changes were made in the structure in accordance with this provision of the contract, and the surety defended upon the ground that he was released from his obligation by such changes having been made without his knowledge and consent, but the court said:

> But if, by the terms of the original contract, additions to or alterations in the work are provided for or left to the judgment and discretion

of the other contracting parties, either *without limit* or within certain limits, then the variation, if within the limits prescribed, is allowed by the contract itself, and the surety can not complain of a variation which he has agreed to by the original contract; and whether the present case falls within the principle here stated depends upon the terms and construction of the original contract and the nature and extension of the changes in and additions to the plan and finish of the work as originally contemplated. We fully concur with the court below in its construction of the contract. We think it clear that the additions and alterations were all within the contemplation of those provisions of the original contract to which we have referred. The power to make additions and alterations, as we have seen, was plainly reserved and was of the most comprehensive nature, and to say that the additions that were actually made were not within the reservation would be placing such a restriction upon the terms of the contract as is neither justified by any rational rule of construction nor consistent with the manifest design of the parties. * * *

It is no argument against the construction adopted that there is great difficulty in fixing a limit within which additions and alterations might be made. That argument, if of any force at all, goes to the denial of the right to make any additions or modifications whatever, a proposition utterly inconsistent with the terms of the contract.

In *The Building and Loan Association* v. *Fitzmorris* (7 Mo. App., 283, 293) the defendants set up affirmative defenses, alleging that the contract had been

changed without their consent. The contract itself provided for changes from "original design or in mode of work" which shall "in no wise vitiate or annul this agreement." The court (at p. 292) say:

> The mere fact that there were departures from the original plans and specifications could not operate such a discharge, because changes under the direction of the architect were expressly provided for in the contract.

In the case of *Village of Chester* v. *Leonard* (68 Conn., 495) the trustees of the plaintiff made a contract with the defendant to build certain waterworks. The other defendants were sureties on the bond furnished by Leonard to the trustees for the faithful performance of the contract. The contract provided that the engineer should have "power to make such changes in the form, dimensions, and alignment of the work as may in the opinion of the engineer and waterworks commissioners be necessary for the proper fulfillment of the work." During the progress of the work certain material changes were made under the foregoing clause in the contract, and the sureties claimed to have been released by reason of such changes, and also claimed to be released because of certain deviations in the manner of making payments to the contractors. The court held that the sureties were released because of the changes made in the method of payment, but with reference to the changes made in the structure it said:

> So far as concerns the changes in the line, site, level, or dimensions of water pipes, they

were all warranted by the provisions of the contract that the quantities of the work to be done as specified were approximate only, and could be increased or diminished by the board of water commissioners, and that the engineer could make such changes in the forms, dimensions, and alignments of the work as might in his opinion and that of the board of water commissioners be necessary for its proper fulfillment. It was for them and not for the courts to determine whether the changes ordered were in fact necessary. Sureties for the performance of the contract so framed must be presumed to contemplate the making of such changes, *and as the defendants did not stipulate for any right to prescribe in determining whether they should be made, there was no occasion to notify anyone but the principal contractor of the fact that they had been ordered.*

Decisions of like import are numerous. For example see—

De Mattos v. *Jordan*, 15 Washington, 378.

Northern Light Lodge v. *Kennedy*, 73 Northwestern Rep., 574 (7 N. Dak., 146).

Beers v. *Strumple*, 22 Southwestern Rep., 620 (Supreme Ct., Mo., 1893; not reported in Mo. Rpts.).

Risse v. *Hopkins Planing Mill Co.*, 40 Pacific Rep., 904 (55 Kans., 518).

McLenan v. *Wellington*, 30 Pac. Rep., 183 (48 Kans., 756).

Hayden v. *Cook*, 34 Nebraska, 670.

Ashenbroedel Club v. *Finlay*, 53 Mo. App., 256.

Smith v. *Molleson*, 148 N. Y., 241.

Many of these cases are cited in the opinion of the learned judge of the circuit court (Transcript, pp. 18, 19, 20), and the doctrine has never been better announced than in the opinion of the circuit court in passing upon the alleged alteration made by the supplemental contract of June 16, 1893, wherein the court said:

> It is unnecessary to determine whether it would be obligatory upon the contractor to enter into the supplemental contract to which reference is made in this article, however doubtful it may be whether the United States is protected in that regard. Nevertheless, the article does provide a procedure to be observed, should occasion arise, for deduction from or addition to the work as prescribed in the plans and specifications, and it is contemplated, at least, that the contractor may enter voluntarily into such a contract, and that such contract shall not affect the validity of the main agreement. Did not the sureties, when reading this provision, discover and understand that such changes might be called for; that the contractor might make a supplemental contract therefor, and that the change stipulated would not invalidate the original contract to which they stood in the relation of parties? Would it be reasonable to hold that the sureties understood, or were fairly justified in understanding, while reading this seventh article, that any changes made pursuant to it would release them from their relation to the original contract, whose continued validity was declared, notwithstanding

such changes? Finally, would it be consonant with the intention of the parties, including the sureties, to read into the seventh article a provision that the making of an auxiliary contract without the consent of the sureties should release them? It is considered that, although the contractor was not by any specific terms obligated to enter into any subsidiary agreement, yet that he might be asked to do so, and that the article contemplated his assent to modifications of the work, without impairing the main obligation or the liability of those who assured its performance. If this be correct, did the contemplated change of the contract justify the agreement for the 70 feet extension of the dock? This presents a grave question, and its solution requires some just rule of general application. Do sureties, by consenting to changes involving an enlargement of the work, consent to an unlimited extension thereof? Could the dry dock have been doubled in length? If the contract were for a two-story house, could it have been increased to twenty stories? If it were agreed that the material should be of wood, could marble be substituted? Obviously, such extensive changes would not be within the thought or the understanding of the parties or the sureties. *But a rule of interpretation, otherwise suitable, can not be defeated by showing the absurdity of its unlimited application. All rules operate within reasonable limits, and the court regards their legitimate use and not their abuse.* Where a building contract contemplates changes in the work which will bind the sureties for the fulfillment of the contract as modified the changes

subsequently made must bear in extent and value some reasonable ratio to the original structure. If the plans and specifications call for a house of particular dimensions and quality, a consent to changes anticipated in the contract should be construed to be limited to changes relevant to, and consistent with, the structure first projected. Changes of such nature, and only such changes, would be anticipated by all the parties to the contract as would be reasonable and cognate to the structure primarily planned and its purpose. In the case at bar, a large dry dock was required by the United States, to be located at a principal navy-yard, and it was manifestly intended for the accommodation of all classes of Government vessels. Article seventh manifestly contemplated that changes in its dimensions might be required, and provided for auxiliary contracts for fixing a due consideration for such extension, without disturbing otherwise the continuance of the principal engagement. The subsidiary contract provided for an extension of 70 feet, which was nearly 12 per cent of the length first adopted, at an increased cost of about 7½ per cent of the whole consideration. Considering the magnitude of the structure as first intended, and its great expense, and the large use to which it was devoted, the change seems to be such as the parties might have had in view in subscribing to the provisions of the seventh article. The change is a homeogeneous and not an incongruous addition, nor even a duplication of parts, as

would be the case in multiplying the stories of a house, but it is the mere symmetrical enlargement or extension of a specific thing, the construction of which was undertaken, and such enlargement is not greater than the customary use of a dry dock by the Government might demand in common sense. Although article 7 might well have contained clearer provisions for the continued obligation of the sureties and the protection of the Government thereby, yet it seems to admit fairly of the interpretation given.

After so learned an exposition of the law applicable to changes made in a contract pursuant to a clause authorizing such changes, it seems strange that the learned circuit judge did not apply the same rule of law to the alleged change made by the supplemental contract of August 17, 1893, as he did to that made by the supplemental contract of June 16, 1893. The idea upon which the circuit court and the circuit court of appeals proceeded in holding that the sureties were released from their obligation by the supplemental contract of August 17, 1893, was that by locating the dock 64 feet farther inward they had thereby changed the location of the dock in such wise as that it was no longer upon the water line. It will be observed that by the first supplemental contract (Record, p. 10) the dock was extended from 600 feet to 670 feet, that is to say, the head of the dock was located 70 feet farther by this extension than was originally intended. Was not this just as much a change in the location of the dock as it was to set the table end of the dock 64

feet farther inland? It will likewise be observed that the first change involved the expenditure of nearly $50,000, and bore a relation of about 12 per cent to the total cost of the entire structure, whereas by the second supplemental contract the increased expenditure was only some $5,000, bearing a relation of a little more than 1 per cent; and yet the first modification was held to be warranted by the contract upon the theory that the change was a homogeneous and not an incongruous addition nor a duplication of parts, whereas the second modification was held to be unwarranted, because by setting the head of the dock 64 feet further inland, the contract to locate the dock upon the water line had been violated. It is admitted both by the circuit court and by the circuit court of appeals that the contract would have authorized the Government to have changed the entire location of this dock up or down the river anywhere within the confines of the navy-yard at Brooklyn (see Rec., p. 31), but both courts seem to be impressed with the idea that the words "place on the water line" must mean immediately adjacent to the water, whereas in truth the true interpretation of those words mean that the dock is to be located at or near or adjacent to the water, as shall best conduce to the purposes for which the structure was erected, and taking into consideration the physical exigencies, limitations, and necessities of the surroundings of the site. (See *Simpson* v. *United States*, 31 C. Cls. R., at p. 241.) Of course, if this dock had been built half a mile or more from the East River, so that a ship canal would

have had to be built between the river and the dry dock, that would be entirely another question; but it does seem most inaccurate to say because the head of the dock is situated 64 feet from the actual river, that therefore it is not situated at some place upon the water line.

In *Smith* v. *Molleson* (148 N. Y., 241) the court said:

> It should also be observed that there is a clause in the contract, the material part of which reads as follows: "Should the owner at any time during the progress of the said work request any alterations, deviations, additions, or omissions from the said contract, he shall be at liberty to do so, and the same shall in no way affect or make void the contract." The defendants, having, by reference, in effect, made the contract a part of the bond, must be deemed to have assented to these provisions, and to any changes or deviations in the performance of the building contract made under it. She has, in effect, guaranteed the performance of a written contract between other parties, which by its terms permits the parties to change it or deviate from it. While it is not important to consider the real scope of this clause since we prefer to dispose of the question in the case upon the ground that there was no material departure from the contract when properly construed, it should be noted that she consented in advance to changes of such character, which are permitted by the contract in language quite broad and comprehensive.

Such is the case at bar. It can not be doubted that the intention of the contractor, the surety, and the

agents of the United States was, under the seventh clause of this contract, to build a dry dock as nearly as possible in conformity with the original contract, plans, and specifications, but nevertheless to provide in the broadest and amplest way, without in anywise jeopardizing the validity of the contract, or the obligations of the contractor, or the obligations of the surety, for such changes, either in the precise location of the table end or the precise length, or the capacity of the dock, or for any other changes of location or material or of character of construction that should be rendered necessary from time to time in order to complete for the Government a thoroughly substantial and excellent dry dock. The contention of the defendant in error in this case is by a strained technicality to avoid a just liability which he voluntarily assumed with his eyes wide open. The contention is utterly without merit under the severest application of *strictissimi juris*, for that is a rule of application and not of construction.

III.

DEMURRER WAS NOT THE PROPER WAY IN WHICH TO RAISE THE CONTENTION OF THE DEFENDANT IN ERROR.

The demurrer in this case should have been overruled for the reason that the defense relied upon by the defendant in error should have been set up by answer and not by demurrer. The complaint of the plaintiff recites the original contract and two supplemental contracts and the bond, charging that the bond is a part of the contract and has as much application to the supplemental contracts as to the original. This was all the plaintiff was required to do in his plead-

ings. The rule of law is that any substantial change made in a contract *without the knowledge and consent* of the surety will release the surety from his obligation, but want of knowledge and assent is an affirmative defense to be set up by the defendant and is not required to be traversed by the plaintiff in his declaration in anticipation. In the case of *Shepard* v. *May* (115 U. S., at p. 511) the court said:

> But even if it had been shown that Shepard had become the surety of Walker, it was incumbent upon the former to show as a part of his defense that the indulgence given by May to Walker was without his assent. There was no proof of want of assent. The defense therefore failed. (Citing cases.)

So, in an action against a surety on a note, the burden of proof to support the plea of alteration is upon the surety (*Truesdell* v. *Hunter*, 28 Ill. App., 292).

In second Brandt on Suretyship (2d ed., sec. 345) it is said:

> The assent of a surety to an extension of time may be proved, like other facts, by circumstantial evidence, and it has been held that a regular usage of a bank to receive payments by installments, or checks, at sixty or ninety days, or whatever length of time such regular rule prescribed, with interest on the balance in advance, furnishes presumptive evidence of the assent of those who become parties to notes payable to the bank that the payment may be delayed and received in installments according to such usage until the contrary is shown.

(Citing *Crosby* v. *Wyatt*, 10 N. H., 318; and 8 Greenleaf (Me.), 191.)

If these doctrines be sound, then, manifestly, the demurrer was improperly sustained, because the burden of proof to show want of knowledge and assent on the part of the surety of the alleged changes in the contract was upon the plaintiff in error and should have been pleaded and proven, and could not have been raised by demurrer, and in the second place, such evidence as might have been offered by the defendant in error to this effect might have been overcome by the plaintiff in error by submitting parol testimony to prove that as a matter of fact the surety did have actual notice of the so-called changes, and having such actual notice acquiesced and consented thereto. It is not necessary that the surety should have evidenced his assent in writing, and there is nothing whatever in this case to show as a matter of fact that the defendant in error did not actually know of and acquiesce in these so-called changes in the original contract.

It is therefore submitted that the decision of the circuit court of appeals for the second circuit should be reversed and the cause remanded to the circuit court for the eastern district of New York with directions to overrule the demurrer and permit the trial to proceed upon its merits.

GEORGE HINES GORMAN,
Special Attorney.

L. A. PRADT,
Assistant Attorney-General.

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No. 224.

APR 11 1902
JAMES H. McKENNEY, Clerk

Supreme Court of the United States,

OCTOBER TERM, 1901.

Brf. of Soley for D. C.

No. 224.

UNITED STATES OF AMERICA,
Plaintiff in Error,

Filed Apr. 11, 1902.

vs.

EDWARD J. FREEL, AS EXECUTOR, ETC., IMPLEADED WITH JOHN GILLIES ET AL.,
Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Brief on behalf of Defendant in Error Edward J. Freel, as Executor, etc.

JAMES RUSSELL SOLEY,
Of Counsel,
For Defendant in Error Edward J. Freel.

MARTIN B. BROWN CO., Printers and Stationers 49 to 57 Park Place, New York.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 224.

UNITED STATES OF AMERICA,
Plaintiff in Error,

against

EDWARD J. FREEL, as Executor, etc., impleaded with John Gillies *et al.*,
Defendant in Error.

Brief for the Defendant in Error, Edward J. Freel, as Executor, etc.

This case comes before this Court upon a writ of error to the United States Circuit Court of Appeals for the Second Circuit, to review a judgment of that Court (Transcript, p. 32) affirming a judgment of the Circuit Court of the United States for the Eastern District of New York rendered on the demurrer of the defendant Edward J. Freel, as executor, to the complaint of the plaintiff, the United States, the demurrer proceeding upon the ground that the complaint does not state facts sufficient to constitute a cause of action against this defendant.

The action is one for damages against the defendant Gillies on the ground of his alleged breach of a certain contract to build a dry dock. It is also brought against Gillies' bondsmen under the contract, one of whom was the testator of the present defendant in error. The courts below decided in effect that by reason of changes in the primary contract the surety was absolved from liability. The question here presented is upon this decision.

Facts.

The claim of the Government against the sureties is stated in the fourth paragraph of the complaint (p. 1), where it is alleged that they, on November 17, 1892, entered into an agreement with the Government in the nature of a bond, on which they became liable to the Government unless Gillies should "well and truly perform the *stipulations* of the contract *of even date herewith.*" It is not alleged in the complaint, and it is not the fact, that the sureties were *parties* to Gillies' contract with the Government. It is not alleged in the complaint, nor is it the fact, that the terms of Gillies' contract were made a part of the bond. It is not alleged in the complaint, and it is not the fact, that the sureties at any time after November 17, 1892, made any other agreement with the Government in relation to these matters. But it is alleged in the complaint, and it is the fact, that Gillies and the Government thereafter agreed to certain changes in this original contract, the original contract being thereby abandoned by mutual consent.

The sole liability of the sureties was to see that Gillies should well and truly do what he had agreed to do by a contract between himself and the Government of November 17, 1892. This primary contract between Gillies and the Government is annexed to the complaint

and marked "Exhibit A" (p. 4). The fundamental and underlying provision of that contract is as follows (p. 4):

> "*First*—The contractor will, within twenty days after he shall have been tendered the possession and occupancy of the site by the party of the second part * * * commence, and within twenty-seven calendar months from such date construct and complete, ready to receive vessels, a timber dry dock to be located at such place *on the water line* of the Navy Yard, Brooklyn, New York, as shall be designated by the party of the second part."

On the 16th day of June, 1893, and therefore seven months after the making of the contract, an agreement was entered into between the contractor and the United States to lengthen the dry dock from 600 feet, as called for in the specifications, to 670 feet. This supplemental contract (Ex. B) will be found at page 10. It provided for additional compensation and an extension of time for the completion of the dock. It increased the work of the contractor by 12 per cent. and was a change of such magnitude as to call for an additional compensation of $45,556.

In August, 1893, a second change was made of a most important character. This was in the *location* of the dry dock. Article I. of the contract provided, as stated, that the dock should "be located at such place *on the water line* of the Navy Yard, Brooklyn, N. Y., as shall be designated by the party of the second part." At the time this primary contract of November 17, 1892, was entered into, the party of the second part, that is, the Government, had designated the location of the dock, as provided in Article First, and had caused it to be laid down and staked out. This first location, on the water line, so laid down and staked out at the time of the

primary contract, continued to be the location of the dock until August 17, 1893, that is to say, for nine months. Under the provisions of Article I., the work was to begin within twenty days after the contractor "shall have been tendered the possession and occupancy of the site." And this "possession and occupancy of the said site during the period of construction and until the completion and delivery of the work hereinafter mentioned, shall be secured to the contractor by the party of the second part" (p. 4).

The second supplemental contract, dated August 17, 1893, providing for the change of location (Exhibit C, p. 11), recites that "it has been deemed desirable *to change the location of the dry dock now being constructed* at the U. S. Navy Yard at Brooklyn," that is, on the site which had been originally designated, on the water line. Gillies thereupon agrees with the Government that

> "he will in the construction of the said dry dock *change its location to one 64 feet further inland* than that laid down and staked out when the said contract was entered into, and that he will perform all the additional excavation necessary at the entrance of the dry dock in consequence of the said change of location; also all the additional work necessary to lengthen the suction pipes provided to be laid from the present pump-house, including the piping, round piles, sheet piles, timber, iron-work, excavation and back filling, etc., and all other work incident to said *change of location*, supplying all the labor and materials therefor."

This contract further stipulated that the contractor should be paid for this agreement the sum of $5,063.18, and it extended the time for the completion of the dry dock eight weeks on account of the change in position.

It is contended on the part of the demurrant that under the well-established rules relating to sureties these changes in the original contract, to which it is not alleged or pretended that the surety consented, absolved the surety from his liability. The plaintiff in error contends that by virtue of Article VII. of the original contract the surety may still be held, the two supplementary contracts to the contrary notwithstanding. The provisions of Article VII. are as follows (p. 6):

> "*Seventh*—The construction of the said dry dock and its accessories and appurtenances herein contracted for shall conform in all respects to and with the plans and specifications aforesaid, which plans and specifications are hereto annexed, and shall be deemed and taken as forming a part of this contract, with the like operation and effect as if the same were incorporated herein. No omissions in the plans or specifications of any detail, object or provision necessary to carry this contract into full and complete effect, in accordance with the true intent and meaning hereof, shall operate to the disadvantage of the United States, but the same shall be satisfactorily supplied, performed and observed by the contractor, and all claims for extra compensation by reason of, or for or on account of such extra performance are hereby, and in consideration of the premises, expressly waived; and it is hereby further provided, and this contract is upon the express condition, that the said *plans and specifications* shall *not* be changed in any respect, except upon the written order of the Bureau of Yards and Docks; and that if at any time it shall be found advantageous or necessary to make any change, alteration or modification in the aforesaid plans and specifications, such change, alteration or modification must be agreed upon *in writing* by the parties

to the contract, the agreement to set forth fully the reasons for such change and the nature thereof, and the increased or diminished compensation, based upon the estimated actual cost thereof, which the contractor shall receive, if any. Provided, that whenever the said changes or alterations would increase or decrease the cost by a sum exceeding five hundred dollars ($500), the actual cost thereof shall be ascertained, estimated and determined by a board of naval officers to be appointed by the Secretary of the Navy for the purpose, and the contractor shall be bound by the determination of said board, or a majority thereof, as to the amount of increased or diminished compensation he shall be entitled to receive in consequence of such change or changes. Provided further, that if any enlargement or increase of dimensions shall be ordered by the Secretary of the Navy during the construction of said dry dock, that the actual cost thereof shall be ascertained, estimated and determined by a board of naval officers, to be appointed by the Secretary of the Navy, who shall revise said estimate and determine the sum or sums to be paid the contractor for the additional work that may be required under this contract. And provided also, that no further payment shall be made *unless such supplemental or modified agreement shall have been signed before the obligation arising from such change or modification was incurred*, and until after its approval by the party of the second part. And further provided, that no change herein provided for shall in any manner affect the validity of this contract."

In regard to the effect of Article VII. it is contended by the defendant in error:

First—That the provisions of the article relate at

most to changes merely in the plans and specifications of the contract, and that there is nothing in the article which remotely refers to a change in the location of the work as fixed by Article I. of the contract itself. Therefore Article VII. does not in the slightest degree aid the plaintiff in error, so far as our contentions are based upon the change in the location of the dry dock agreed to by the second supplemental contract.

Second—That Article VII. contains no stipulation or agreement by Gillies to assent to such changes in the plans and specifications as the Government might suggest. Whenever Gillies and the Government agreed upon subsequent changes, the same was done by Gillies of his free volition and not in the carrying out of an agreement of Gillies contained in the original contract, and, therefore, not in the carrying out of an agreement which the sureties stood bound to see that Gillies performed. Article VII. was inserted for the purpose of affording a protection to the Government and to the contractor in the nature of a statute of frauds against disputes as to extra compensation.

Third—That if Article VII. is construed to contain an obligation on Gillies' part to agree to such changes as the Government might direct, that very construction of the article requires the Courts to construe strictly the limitations upon the Government in regard to the nature of the changes in the plans and specifications, and therefore requires the Court to say that the Government is precluded from making any such extensive and far-reaching changes as were made.

Fourth—That the supplemental contracts are upon their face not entered into pursuant to the provisions of Article VII., in that they fail to specify various of the matters required to be specified by that article.

POINT I.

A change in the provisions of the contract absolves the surety from liability.

The proposition that a change in a contract, the performance of which is guaranteed by a surety, ordinarily absolves the surety from any liability is so familiar that it is hardly necessary to refer to authorities.

The change may be small in extent.

The change may be "immaterial."

The change may even be deemed "beneficial" to the surety.

Nevertheless, if there be a change the surety is not liable.

As is well stated by the Trial Court (92 F., 299):

> "A surety has a right to stand on the very terms of his contract; and if he does not assent to any variation of it and a variation is made, his liability will be extinguished even though such alteration be for his own benefit."

Equally important is the principle that the liability of a surety cannot be extended by implication, and that the Courts will carefully guard his rights and protect him against a liability not strictly within the expressed terms of his contract.

We desire at the outset to lay special stress upon the favor which Courts have uniformly afforded to sureties in suits brought against them. When a departure has been made from the terms of a contract he who has guaranteed the performance of the original contract cannot be held to a liability. It is not necessary in such a

case to discuss the question of how he is affected or how the principal is affected by the change that has been made in the contract as guaranteed. It is a sufficient answer for him to say "this is not the contract which I guaranteed. I did not enter into this undertaking."

The principle is so well settled that it seems unnecessary to cite authorities; and if it were, the great numbers cited in the learned opinion of the Judge at Circuit would make such a reference unnecessary. Ever since Judge Story delivered the famous opinion in 1824, in *Miller* vs. *Stewart*, 9 Wheaton, 680, his language has been reiterated in opinion after opinion:

> "Nothing can be clearer both upon principle and authority than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in his obligation he is bound and no farther. It is not sufficient that he may sustain no injury by a change in the contract or *that it may even be for his benefit.* He has a right to stand upon the very terms of his contract, and if he does not assent to any violation of it and a violation is made, it is fatal, and Courts of equity as well as of law have been in the constant habit of scanning the contracts of sureties with considerable strictness."

In this case a bond had been given for the faithful discharge by a Deputy Collector of Internal Revenue of his duties under a certain appointment for eight townships within the district of the collector. The appointment was subsequently altered by adding another township, and it was held that this extinguished the liability of the surety. "He has a right," says Judge Story, "to stand upon the

terms of his bond which confine his liability to money received under appointment for eight townships."

In *Page* vs. *Krekey*, 137 N. Y., 307, the change in the contract upon which the undertaking was given was merely a change that certain hides should be delivered to a different firm from that named in the primary contract.

Says, O'Brien, *J.*:

> "This question seems to have been disposed of in the court below on the ground that the change was not material; but the answer to that is that the defendant's obligation is *strictissimi juris* and he is discharged by any alteration of the contract to which his guarantee applied, whether material or not, and the Courts will not inquire whether it is or is not to his injury."

In *Smith* vs. *U. S.*, 2 Wall., 234, Mr. Justice Clifford says:

> "The responsibility of a surety rests upon the validity and terms of his contract, but when it is changed without his knowledge or authority it becomes a new contract and is invalid because it is deficient in the *essential element of consent.*"

In *Nat. Mech. Bk.* vs. *Conkling*, 90 N. Y., 116, Earl, *J.*, says:

> "A surety is never to be implicated beyond his specific engagement and his liability is always *strictissimi juris* and must not be extended by construction."

In *Livingston* vs. *Moore*, 15 App. Div., at page 19, it is stated by the Court:

> "It is elementary that *any change* in the terms

of payment named in the contract will discharge the surety."

Citing—

Ducker vs. *Rapp*, 67 N. Y., 464, and *Calver* vs. *Davies*, 73 *id.*, 211.

Says Mr. Justice Daniel:

"As against a surety neither a court of law nor a court of equity will lend its aid to affect him beyond the plain and necessary import of his undertaking. Equity will not as against him assist in completing an imperfect or defective instrument, much less will it add a new term or condition to what he has stipulated. He must be permitted to remain in precisely the situation in which he has placed himself, and it is no justification or excuse with another for attempting to change his situation to allege or show that he would be benefited by such a change. He is said to possess an interest in the *letter* of his contract."

McMicken vs. *Webb*, 6 Howard, 292, at p. 298.

In *United States* vs. *Case*, 25 Internal Revenue Rec., 56 (Northern District of New York), the defendant had guaranteed a contract to furnish stone to the Government in accordance with samples. The contract sued upon was for stone from particular quarries, excluding others specified. It was held that a surety was released from his obligations under a contract guaranteed by him when any modification is made in that contract, even though it be made by mutual agreement between the principals and in a particular not deemed essential by either of them.

In *United States* vs. *Corwine*, 1 Bond, 339 (Sixth Circuit), the principals had bound themselves to the

United States to open a ship canal of certain dimensions and keep it open for a certain number of years from the time of the acceptance of the work by the Secretary of War. The principals did not live up to their agreement and the Government accepted the work with a channel two feet *shallower* than the contract called for. The Court held that the sureties were discharged from all liability.

The Court said:

> "There is no principle better settled than that a surety is not bound beyond the terms of his contract and that his liability cannot be extended or enlarged by implication, and any change in its terms, unless expressly assented to by him, releases him from his legal responsibility. This is familiar law, so long and so well settled that it is not necessary to cite the numerous cases by which it is sustained. * * * This view would seem to be decisive of the question raised on this demurrer, and it is not of material inquiry whether the interference of the Government and its acceptance of the work not executed according to the contract could affect injuriously or otherwise the interests of the sureties. The only ground on which it is claimed that the sureties are liable is that the acceptance of the work in its incomplete state does not place them in any worse condition than if the contract had been strictly complied with and that their liability on their undertaking that the channel should be kept open continues in effect by the act of the Government. The first reply to this assumption is that any change in the terms or obligation of a surety without his consent releases him from liability, and it is well settled that this principle applies even in cases where a modification of the contract is favorable to the sureties."

U. S. vs. *Corwine*, 1 Bond., 343.

Says Danforth, *J.*:

> "The respondent's counsel, however, contends with much earnestness that the alteration made by the creditor and principal debtor is not material, and, therefore, does not injuriously affect the surety. That it changes the contract is very plain, and it does not seem necessary to inquire what mischief the alteration might produce or how it might be prejudicial to the surety. The law requires that if there is any agreement between the principals with reference to a contract to the performance of which another is bound as surety, he ought to be consulted in regard to any proposed alteration, and if he is not or does not consent to the alteration, he will be no longer bound, and the Court will not inquire whether it is or not to his injury."

Paine vs. *Jones*, 76 N. Y., 274, at p. 278.

Under the well established rules laid down in the above authorities and for which innumerable other authorities might be cited, it is clear that the changes made by either of the two supplemental contracts of 1893 were sufficient to defeat any liability of the surety, unless the surety expressly guaranteed the contract as changed. They were changes of great magnitude, involving great additional labor, as is shown by the fact that they called for over $50,000 of additional compensation. The first change made the dock one-ninth as large again as it had been. The change made by the second of the supplemental contracts was even more extraordinary. The contract had provided that the dock was to be built on the water-line, and the location had been fixed there. Nine months later, and therefore when the work was considerably advanced, the location was changed and fixed at an inland point. Obviously, unless some facts can be shown which take this

case out of the application of the general rule, the changes in the contract were such as would entirely do away with the liability of the sureties.

POINT II.

The provisions of Article VII. do not take the case out of the general rule governing the liability of the surety.

The only question that arises here is whether the provisions of Article VII. of the original contract take both the changes made by the supplemental contracts out of the ordinary rule of law, so that the surety can be held notwithstanding them.

The statement is loosely made that Article VII. was inserted in the contract "in contemplation of changes." In a certain sense the possibility of changes in the minor details of a structure is a matter "contemplated" by the parties to every contract. In the contract at bar this contemplation took some formal shape under provisions prescribing the conditions which should be necessary to enable the contractor to obtain extra compensation, namely, that the change "must be agreed upon in writing by the parties," "the agreement to set forth fully the reasons for such change," and the "increased or diminished compensation," and that the question of compensation should be referred to a board of naval officers.

The provisions which thus prescribe the formalities by which changes and the compensation therefor should be agreed upon and determined between the parties, if the contractor desired extra compensation, do not constitute any agreement on the part of the surety that he shall be

bound by any and all changes the contractor sees fit to make, or that the Government shall be absolved from the simple duty of obtaining the consent of the surety to such changes.

The condition of the bond is stated in the complaint. It was for the "performance of the *stipulations* of the contract of even date herewith." The surety was not a party to that contract in any proper sense. He bound himself by *another* contract to be responsible for the carrying out of whatever Gillies by his contract had bound himself to do. If Gillies bound himself by that contract to build a dock in accordance with whatever variations from the original plans and specifications the Government might require, then should the Government require such variations and should Gillies fail to do the work as so changed, the surety would be bound. We contend that the language of Article VII. did not impose upon Gillies the obligation of building the dock in accordance with whatever variations or changes from the plans and specifications the Government might require. We contend that he acted as a voluntary agent in agreeing to the changes that were made, and that the consent of the surety to his new liability should have been obtained in order to hold him.

On a careful examination of Article VII. it will be found that there is not, from the beginning to the end, any express agreement on the part of the contractor that he will without further promise alter the plans and specifications in any respect that the Government requires, nor is there any reservation to the Government of the right to require such changes. This clause was clearly inserted to prevent fanciful claims on the part of the contractor for extra compensation, such as had been put forward by other contractors, and notably by dry-dock contractors under similar circumstances.

The article starts out with the statement that the construction of the dry dock shall in all respects conform to the original plans and specifications, *which are annexed to the contract.* It then provides that any small omission in either plans or specifications of items necessary to the performance of the contract shall not operate to the disadvantage of the Government, and that no extra compensation shall be allowed to the contractor therefor. Coming to the question of changes and of *new agreements* in respect thereto, there are several provisions to govern the form of such agreements. They are contained in this significant language:

> "And that if at any time it shall be found advantageous or necessary to make any change, alteration or modification in the aforesaid plans and specifications, such change, alteration or modification must be agreed upon in writing by the parties to the contract, the agreement to set forth fully the reasons for such change, and the nature thereof, and the increased or diminished compensation, based upon the estimated actual cost thereof, which the contractor shall receive, if any."

It would seem that words could not more clearly state that the proposed changes must be the subject of agreement between the parties; that in making them, each performs a voluntary act and makes a voluntary promise. This is not the language that would be used if one of the parties, namely, the contractor, was intending to agree beforehand that he would make any changes which the other party, namely, the owner, might require. It negatives the idea of any existing obligation to make any and all changes that the Government might require, and of an entire surrender of independent volition in this respect on the part of the contractor.

Further provisions show that the agreement must "set forth fully the reasons for such change," and the nature thereof; it must state the exact sum which the contractor is to receive; the amount, if it exceeds $500, is not to be determined by the Bureau, but by board of naval officers, after investigation. Enlargements of dimensions must be upon the authority of the Secretary of the Navy himself in order to be effectual. Finally, "no further payment shall be made unless such *supplemental or modified agreement* shall have been signed before the obligation arising from such change or modification was incurred."

As was stated by the Trial Court (p. 92, F. 299), "a characteristic feature of this article is the Statute of Fraud which it embodies. Its salient and essential purpose was to guard the Government from claims for extra work. This appears repeatedly as the section progresses."

There is no doubt that the provisions are intended to put a veto upon any general claims for extra compensation on the part of the contractor. But nothing there can be spelled out to contain an agreement on the part of the contractor without further promise to conform to anything and everything that the Government might desire. In fact, the requirement that the change "must be agreed upon in writing by the parties to the contract" completely contradicts any such idea.

For this reason the provision also serves as a protection to the contractor. It excludes any idea that the Government can order alterations at will. Alterations must be the subject of an agreement between both parties. The agreement must be in writing. The reasons for the alterations must be stated in the agreement. Even the Bureau making the contract is not empowered to act of itself in all cases where it makes a new agreement with the contractor. It cannot agree to

an enlargement of dimensions without an order from the Secretary of the Navy. It cannot agree to the cost of changes without the determination of a board.

Finally, the modified agreement must have been signed before the obligation arising " from such change or modification " was incurred.

It may be said of these provisions that they are in part for the protection of the Government against the contractor, in part for the protection of the contractor against the Government, and in part for the protection of the Government against its own officers. But whatever they are, they leave the contractor a free agent in the making of his agreement.

The plaintiff in error deduced in the Court below the following conclusion from cases cited:

> " We deem it established by the foregoing authorities that where the original contract reserves to the owner the *right* to make changes and alterations without any limit, the sureties on the bond given for the faithful fulfilment of that contract by the contractor are not released by showing that changes and alterations have been made pursuant to the contract."

If the phrase " where the original contract reserves to the owner the *right* to make changes and alterations without any limit " means " where the original contract imposes on the contractor the *obligation* without limit to make such changes and alterations as may be prescribed by the owner," we presume that nobody will dispute the proposition. In point of fact, such changes are not deviations from the original contract; they are a part of it.

The cases bear out the contention only if intended in that sense.

Wehr vs. *The German Lutheran Church* (47 Md., 177) cited by the plaintiff in error on page 15 of his brief as "the case most similar to the one at bar" is, in fact, diametrically opposite in this crucial point. In that case, the provision of the contract bearing the alleged resemblance to the present Article Seventh, was this:

> "Should the building committee appointed by said congregation desire to make any changes from the drawings and specifications at any time during the progress of the work, *the same shall be carried out* by the said Seigman & Jones (the contractors) without making void or in any manner affecting this contract."

The words, "the same shall be carried out," imposed upon the contractor a compulsion to make "any changes" which "the Building Committee appointed by said congregation desire." The plaintiff in error cannot read into Article Seventh any such meaning as is contained in the words of the contract in the Wehr case. There are no similar words in Article Seventh, and it is impossible to distort the language of Article Seventh into the conveying of any such meaning, or the imposing of any such compulsion upon the contractor. For this reason the Wehr case not only does not aid the contention of the plaintiff in error, but is directly in point in support of the surety's contention here, to wit: that in no case does the surety's liability survive alterations in the original contract to which he did not assent, unless a *positive compulsion* to make the changes, or impose upon the contractor by the terms of the original contract. If, by the terms of the original contract such a duty is imposed, as in the Wehr case, and in the case next cited by the plaintiff in error, The Village of Chester *vs.* Leonard, 68 Conn., 495, a different question is raised, and one which it is not necessary here to discuss. The limitations of this proposition

are fixed by the language of the contract here before the Court, and not by the language of other contracts.

In the *Village of Chester* vs. *Leonard*, 68 Connecticut, 495, the Court said of the provisions of the contract:

> "The quantities of work to be done as specified were approximate only and could be increased or diminished by the Board of Water Commissioners, and (the contract provided) that the engineer should have power to make such changes in the form, dimensions and alignment of the work as may, in the opinion of the engineer and Water Works Commissioner, be necessary for the proper fulfilment of the work."

Here again there was a power to make the changes expressly reserved in the owner.

It is to be noted, however, that in this case the Court held that the sureties were released because of changes in the method of making the payments.

In *DeMattos* vs. *Jordan*, 15 Washington, 378, at page 380, the Court says:

> "The contract provides that the contractor shall perform any work requiring any alteration, modification or addition which the architect and owner shall demand as the work progresses upon receiving written authority from the architect approved by the owner specifying," etc.

Here again the obligation was upon the contractor to make any changes that were required of him.

In the case of *Northern Light Lodge, No. 1, I. O. O. F.*, vs. *Kennedy*, 73 N. W. Rep., page 524, the contract said:

> "The I. O. O. F. (the owner) shall be at liberty to make such changes or alterations during the con-

struction of the building as they shall consider necessary, and the contract shall not be invalidated by such action, but a proper allowance shall be made in the price of contract at the time of said changes," etc.

Here again the right was reserved to the owner.

It is to be noticed that in this case the contract also provided, in addition to the above requirement, that

> "No alterations shall be made * * * except upon the written order of the architect,"

and the Court held that inasmuch as the alterations had been made pursuant to oral instructions from the owner and not upon a written order by the architect, the sureties were released.

In *Beers* vs. *Wolf & Strimple,* 22 S. W. Rep., 620, the contract contained the following clause:

> "The superintendent shall be at liberty to make any deviation from, or alteration in the plan, form, construction, detail and execution described in the drawings and specifications without invalidating or rendering void this contract."

Here also changes are compulsory.

In *Risse* vs. *Planing Mill,* 40th Pac. Rep., 904, as stated by the Court, page 905:

> "The owner had reserved the right to make changes which was expressly provided for in the contract."

In *Hayden* vs. *Cook,* 12 N. W. Rep., 165, the provision was a similar one, page 167, that—

> "Should the said party of the second part at any time during the progress of the said works require any alteration or deviations from additions to or

omissions in the said contract he shall have the right to make such change or changes and the same shall in no way injuriously affect or make void the contract," etc.

In *Smith* vs. *Molleson*, 148 N. Y., 24, the clause is:

"Should the owner at any time during the progress of the said work request any alterations, deviations, additions or omissions from the said contract he shall be at liberty to do so and the same shall in no way affect or make void the contract."

Four other cases are noted in the learned opinion of the Trial Court (p. 92, F. 299, *et seq.*), as follows:

In *Consaul* vs. *Sheldon*, 52 N. W. Rep., 1104, at page 1107, the contract stipulated that—

"Should the proprietor at any time during the progress of the work require any alterations of, deviations from or additions in the said contract, specifications or plans, he shall have the right and power to make such change and changes and the same shall in no way injuriously affect or make void the contract."

In *Howard County* vs. *Baker*, 119 Mo., 393, the contract provided that the County Court, through the architects, might make any alteration desired in the specifications and should have the right and power to make any such change or changes and that the same should in no way injuriously affect or make void the contract.

In *Ashenbroedel Club* vs. *Finley*, 53 Mo. App. Reports, 256, the contract provided (at p. 258):

"The architect and superintendent shall be at liberty to make any deviation in the plan, form, construction, detail and execution prescribed by the specifications without invalidating or rendering void this contract."

In *Western Building Association* vs. *Fitzmaurice*, 7 Mo. App. Reports, 283 (at p. 285), the contract provided:

> "If the party of the second part or the architect shall find it necessary to make any changes or alterations from the original design or in the mode of work, such change or alteration shall be made by the parties of the first part and shall in no wise vitiate or annul this agreement."

It appears that in every one of these cases the voluntary action of the contractor was taken away, that he was no longer a free agent, that he was bound by the contract to make such changes as the owner or owner's agent might direct.

No such compulsory obligation on the part of the contractor is to be found in Article VII. of the contract at bar. The article carefully avoids the statement so frequently used in contracts as almost to be conventional, "the parties of the second part shall be at liberty (or shall have the right) to make such alterations, modifications or changes as it may deem necessary."

There is not a word in the article to indicate a reservation of such a power in the Government, and an indefinite agreement on the part of the contractor. On the contrary, there is a plain statement that

> "If at any time it shall be found advantageous or necessary to make any change, alteration or modification in the aforesaid plans and specifications, such change, alterations or modifications *must be agreed upon* in writing by the parties to the contract, the agreement to set forth fully the reasons for such change and the nature thereof and the increased or diminished compensation based upon the estimated actual cost thereof which the contractor shall receive."

No case has been cited, and we believe none can be found, which holds the surety under a provision in reference to changes, except in cases where such changes are clearly made compulsory upon the contractor by the terms of the original contract.

The learned Trial Judge in his opinion (92 F., 299) gives "a survey of the applicable law" "by summarizing the holdings," in other words, a survey of the principles which are laid down in the reported cases. One of these principles which he suggests as drawn from the cases is that it is immaterial that the primary contract does not make the execution of the changes obligatory on the contractor, provided it empowered him to make a subsidiary contract for the performance thereof or contemplated that he may make voluntary such contract, and he cites as authority for this two of the cases cited above, namely:

> *Northern Light Lodge, I. O. O. F.,* vs. *Kennedy* (North Dakota), 73 N. W. Rep., 524.
>
> *Beers* vs. *Wolf & Strimples,* 116 Mo., 179, and also 22 S. W. Rep., 620.

We submit that the most careful examination of these cases fails to give even a suggestion of any such principle.

In the Northern Light Lodge case, as already noted, the provision was:

> "The I. O. O. F. shall be at liberty to make such changes or alterations during the construction of the building as they shall consider necessary and the contract shall not be violated by such acts, but a proper allowance shall be made in the price of contract at the time of such changes, either to the I. O. O. F. or the contractors, as the case may be."

Here the primary contract made the execution of the changes obligatory upon the contractor. The case starts

with this proposition, nor is there a suggestion even *obiter*, that the surety would be bound if the execution of the changes was not obligatory upon the contractor. The Court says (p. 525):

> "It is clear that the contract expressly declares that the plaintiff may make such alterations or changes as it may deem necessary."

And again:

> "The plaintiff had the right to make such changes or alterations as it may desire."

The Court held that the surety was released because the contract required the order to be in writing and the order in fact was verbal.

In the second case, that of *Beers* vs. *Wolf & Strimple*, absolute power was given to the agent of the owner. The words were:

> "The superintendent shall be at liberty to make any deviation from or alteration in the plan, form, construction, detail and execution described by the drawings and specifications," etc.

It was, however, provided that the parties to the contract which, as it happened, included the sureties, must sign the new agreement. This had not been done, and the surety was therefore released.

There is not in these cases, nor in any other case that we have been able to find after a long search, any decision holding that a mere provision contemplating changes will be sufficient to preserve the liability of the sureties, without their express consent.

Our argument at this point has proceeded to this extent, which we here summarize:

First—The contractor did not stipulate and bind himself under Article VII. to make the changes required.

Second—No authority can be cited holding that in the absence of such a stipulation the surety remains liable simply because it appears by the original contract that "changes were contemplated."

The question is, therefore, open for discussion upon a basis of logical analysis.

The argument against us is that, inasmuch as Article VII. mentioned the contingency of changes and then added "that no change herein provided for shall in any manner affect the validity of this contract," it is apparent that the surety "contemplated" changes and "contemplated" a survival of his liability in spite of them. The answer suggesting itself at once is that "contemplation" is a question of intention and that intention would be only of importance in a matter of this nature in case there were any ambiguity in the express terms of the surety's agreement. There is no such ambiguity. There is in contracts of suretyship no foundation for a liability upon a contract merely *implied* by law. The foundation for this surety's liability is only upon his express agreement. What comes within the language of that express agreement is definite and certain, and the fact "that the possibility of changes was contemplated" is entirely immaterial.

The question was asked at the trial by the learned Trial Judge:

> "Would it be consonant with the intention of the parties including the sureties to read into the seventh article a provision that the making of an auxiliary contract without the consent of the sureties could release them?"

The plain answer to this question is that the *law* reads it in unless the sureties by express agreement read it out. Is it ever within the intention of the owner making the contract, whose performance is guaranteed by a surety, that the surety shall be released by change in the contract? When the owner makes a contract, takes a bond for its faithful performance, and subsequently by an agreement with the contractor makes a change, could anybody suppose that it was within the owner's intention that the surety should be released by that change, or that when the owner made the original contract he intended in making it that an eventual change which he might deem desirable could release the surety?

This is a rule of law, not a question of the intention of the parties, and it is only by reason of an ignorance of the law or a heedlessness in properly protecting himself that the owner ever makes a change in a contract without obtaining the consent of the surety. The fact, however, that his failure to obtain such consent is due to ignorance or to heedlessness does not help him to maintain the liability of the surety even in the case of the Government. In fact, least of all, it might be said in the case of a Governmental department, which has at its command the highest legal ability, which fills its contract with provisions to safeguard the interests of the Government and which substantially is enabled to dictate to contractors and their sureties its own terms in the making of such safeguards. As we shall presently show, this very provision of Article VII., or one identical with it in terms, has received an official interpretation at the hands of the highest law officer of the United States, and the very department of the Government which made this contract had been carefully warned that in case of such a provision for changes and a change made thereunder, it was necessary to obtain the consent of

the sureties; but that warning passed unheeded and the attempt is now made to do exactly that which the law forbids, namely, to charge the surety with liability upon a changed contract by employing or reading into the contract some inferential consent on the part of the surety.

We again call attention to the fact that the surety was not a *party* to Gillies' contract. This is not one of the numerous classes of cases in which the surety signs the original contract itself. The terms of the original contract were not incorporated in the bond. The agreement between the surety and the Government was that Gillies should do whatever he had agreed to do by that original contract. We do not advance the argument at all by saying that in the original contract there was an agreement that changes should not defeat the validity of the original contract. Such a change might very well not defeat the validity of the original contract and yet defeat the liability of one who was not a party to that contract, but who had agreed to see that *that* contract was carried out if the Government desired it to be carried out. There is no ambiguity in the phrase. There is no room for construction, either in favor of or against the surety. If the surety had been a party to the original contract, and had expressly agreed that where Gillies and the Government agreed to a supplemental contract his liability should survive, there would, of course, be no question. But there can be no holding of a surety upon an implied contract. The question is, what has he stated in the bond which he has signed?

As a matter of fact, this clause in reference to the validity of the contract has nothing whatever to do with the question of suretyship. It was obviously inserted so as to give the Government the same right of forfeiture, etc., against Gillies in case of any change in the contract that it had by the original contract. Had it not been for this

clause at the end of Article VII. there might have been some question of the Government's right to forfeit the changed contract pursuant to Article XI. Other reasons can be suggested why such a clause was inserted, but all of them relate exclusively to the contract relations between Gillies and the Government. If the surety was to be bound by any such agreement, it should have been in the sureties' contract or at least have had direct reference to that contract or the obligations it imposed.

Indeed, we have never been able fully to comprehend this branch of our opponent's argument. Changes in a contract are always contemplated in a general sense. The fact that the contractor precludes himself from insisting upon any claim for compensation unless the change shall be agreed upon in writing, does not make changes any more contemplated or any less contemplated than had there been no such provisions. And suppose that the changes were contemplated and were expected in view of the nature of this enterprise, the surety had every reason to expect that as they were subject to agreement on the part of the contractor much more should they be subject to agreement on the part of the surety.

And finally if we are wrong in this and must consider what the surety "contemplated," what then?

The sureties considered, and had a right to consider, and apart from the express agreement must be presumed by the law to have considered, that wherever any change was determined on, their consent would be obtained to it. It is an extraordinary obligation for anyone to assume to guarantee a contract with a provision for indefinite changes. A surety ordinarily gives his guarantee for a specific contract. He studies the contract carefully, the amount of the liability it imposes on the contractor, the contractor's ability to meet it, and all the other elements

of risk involved. He does it on the theory and understanding that his risk has a definite limit disclosed by the features of the contract and the circumstances surrounding it, and this limit to the risk is entirely apart from the limit of the bond. To guarantee a contract subject to indefinite change at the will of others, that is to say, at the will of the parties to the contract, is a guarantee which few prudent men would give, a guarantee of so improvident a character that a court of equity might well be justified in refusing to enforce it. Such a guarantee certainly will not be enforced unless it is expressly shown to be the intention of the parties. It cannot be based upon a mere assumption, or implication. On the contrary, the presumption is clearly that the surety intended that his consent should be obtained to all changes, upon which the parties might agree.

The fact that the primary contract says that, as between the pricipals, any agreement for change, in order to bind them, must be in writing and is surrounded by other formalities and conditions they choose to adopt, and that such a change so agreed upon will not invalidate *their* contract, in so far as their new agreements leave it unchanged, does not give the surety reason to reflect that a new bond from him was not to be asked in case of any such change. All that the surety had before him was what the contract says, namely, that if the principals should make changes, they shall, in order to constitute a ground for compensation, be evidenced by certain instruments for the mutual protection of the two principals, and that the remaining obligations of the two principals shall not thereby be invalidated. There is nothing here to lay upon the sureties an obligation to consent beforehand to such changes, or to imply that such a consent has been already given.

POINT III.

Even if Article VII. be construed so as to bind the contractor to accept changes required by the Government, nevertheless the changes intended under such construction were not of the nature which the new contracts effected.

The changes made by the first supplemental contract of June 16, 1893, was to make a dock a ninth again as long and a ninth again as expensive. It was a dock of an entirely different nature from that proposed by the plans and specifications of the original contract. The value of the change at cost price was over $45,000. Assuming, for the sake of argument, as this point assumes —although in general it is denied—that the contractor is obligated by the contract to make changes in dimensions and that the surety has agreed beforehand that his liability shall survive the change in dimensions which may be required, by the Government, of the contractor, the word "dimensions" must receive a strict construction and should not be so construed as to permit the Government, under a clause relative to the change in dimensions, to impose upon a contractor or upon a surety a requirement of building an entirely different dock. The dock built under the added 70 feet became wholly experimental, the largest dry dock in this country, the largest timber dock ever built in the world. It had to fulfill different requirements and encounter different perils. Certainly no one would repeat the experiment of building such a larg dock, except of stone. The so-called "change in dimensions" altered the entire application and character of the work.

Equally extensive and important was the change effected by the second supplemental contract, that of

August 17, 1893, in the location of the dry dock. At the time the supplemental contract was made the work was in progress. The possession and occupancy of the site had been delivered over to the contractor, and the dry dock was then actually in process of construction. It became necessary to move the dock 64 feet inland and to construct an extensive approach to it, all of which was a change in the original contract. We shall have occasion to speak further about the details when we come to the particular consideration of the change of location. Here it is enough to say that it was not a kind of change which could, by any possibility, be implied or presumed as having been consented to by the surety under the provisions in the contract which required changes in the plans and specifications to be made in writing.

The learned Trial Judge in his opinion (92 F., 299, at 305) conceded that however broad the language providing for changes might be, a limit must be put upon it, and he presents instances of what would be considered too extensive changes. Thus, he says:

> "Could the dry dock have been doubled in length? If the contract were for a two-story house, could it have been increased to twenty stories? If it were agreed that the material should be of wood, could marble have been substituted? Obviously such excessive changes would not be within the thought or understanding of the parties or the sureties."

He goes on to say:

> "But a rule of interpretation, otherwise suitable, cannot be obviated by showing the uncertainty of its limited application. All rules operate within reasonable limits, and the Court regards their legitimate use and not their abuse. Where a building contract contemplates changes in the work which

will bind the sureties for the fulfillment of the contract as modified, the changes subsequently made must bear in extent and value some reasonable ratio to the original structure. If the plans and specifications call for a house of particular dimensions and quality, the consent to changes anticipated in the contract should be considered to be limited to changes relevant to and consistent with the structure first projected."

He then concludes that the first change in question, being a change from 600 feet to 670 feet in length, falls within the rule thus stated. That the change is relevant to the structure first projected will undoubtedly be admitted, and, in a sense, that it is consistent with it. The same might be said of a change doubling the size of the dock, which the Court regarded as manifestly not within the anticipation of the parties. But it is difficult to see what principle would apply to an increase of 70 feet that would not apply to doubling the dock. The Court's whole reasoning is directed to the suggestion that, as a dry dock is a large structure, a large addition to the structure may be permitted under the term "change in dimensions." The Court appears to hold that if the needs of the Government might demand a dry dock of the large size stated, then the phrase "change in dimensions" would cover it.

It is submitted that the possible wants of the owner cannot be taken as a measure of the surety's liability for changes. The question is whether, when a surety guarantees a contract for a given structure with full and elaborate plans and specifications, assuming that he has agreed that his liability shall continue, although changes are made in dimensions, he can be held to have intended to mean that he would guarantee the contract under a change of such extraordinary magnitude. To illustrate

the point the Court cited several cases (92 F, at 306), of "judicial expositions of the allowable departure from original plans and specifications when some change of plans was contemplated by the original building contract."

We will briefly examine these cases.

Risse vs. *Hopkins Planing Company* (Kansas), 40 Pac. Rep., 904. The contract here was for a house. The changes are thus characterized in the opinion (p. 905):

> "The departures from the original plans and specifications were not very important, nor were the alterations expensive. The location of a window was changed. Two of the rooms that were to have been separated by a partition wall were connected by an opening or archway. One of the rooms was sealed with lumber instead of being plastered. An inexpensive ventilator was put in the roof and some other minor changes not particularly mentioned in the specifications were made."

This was all. In this, and as in all the other cases cited, the contract expressly reserved to the owner the right to make changes in general.

In *Consaul* vs. *Sheldon* (Neb.), 52 Northwest, 1104, the opinion does not show the exact character of the changes, but it states as a rule (p. 1107).

> "*The changes and additions must be reasonable and not materially increase the cost of the buildings beyond the original contract price.* The evidence shows that the alterations were not unreasonable and that the additional labor and materials *did not greatly exceed the value* of the work called for by the original contract, which was omitted."

Certainly if such a principle as this were to be applied in the present case, it would put the changes in the dry

dock outside of any contemplated by the original contract, and it embodies a principle far more reasonable than that laid down by the Circuit Court.

In *Howard County* vs. *Baker,* 119 Mo., 397, the contract was for building a court-house for $32,000. In this contract the only change made was a change of the window lintels from stone to railroad iron at a cost of one dollar for each window lintel so changed (pp. 403–4).

In *Ashenbroedel Club* vs. *Finlay,* 53 Mo. App., 256, the contract was for the rebuilding and remodeling of the building. The change (p. 260) consisted in sinking some part of the foundations two or three feet deeper than was shown on the original plan.

In *Wehr* vs. *German Lutheran Church,* 47 Md., 177, the contract was for the construction of a church to cost $35,000, and it was enlarged at a cost of $900 by 3½ feet and a stone foundation was substituted for a brick and pile foundation.

In *Western Building Association* vs. *Fitzmaurice,* 7 Mo. App., 283, the contract was for the construction of three brick buildings, and the changes consisted in the substitution of certain door frames of different form and weight and cost, and changing the finish under certain windows from stools and aprons to paneling, as called for (p. 288). The changes made did not reach the sum of $250 (p. 294).

In *Village of Chester* vs. *Leonard,* 68 Conn., 495, the contract was one of those municipal contracts in which nothing is fixed by the specification, but (p. 507):

> "The quantities of work to be done as specified were approximate only and could be increased or diminished by the Board of Water Commissioners, and the engineer could make such changes in the

> forms, dimensions and alignment of the work as might, in his opinion and that of the Board of Water Commissioners, be necessary for its proper fulfilment."

Under these conditions certain changes in the position of the pipe lines were made. It does not appear that these involved a considerable expense, although there is no statement as to the amount which was involved in the changes, and the case was decided in favor of the defendant surety on the ground that changes had been made in the time and manner of payment fixed by the original contract.

In *Northern Light Lodge, I. O. O. F.*, vs. *Kennedy* (North Dakota), 73 N. W. Rep., 524, the contract was for the erection of a building and the changes increased the cost $1,000. The question whether these changes fell within the provisions of the contract was a question which the Court had no occasion to consider, as it held the security released, because the changes were not provided for by written orders of the architect, as required by the contract.

In *Hayden* vs. *Cook*, 34 Neb., 670, the Court said (p. 676):

> "Some changes and additions in the building were made which increased the cost thereof, although not to a considerable extent. Still other changes were made without additional expense."

The above are all the cases cited by the Court. We refer to a few others, as follows:

In *de Mattos* vs. *Jordan*, 15 Washington, 378, the contract was for a brick and stone building costing $23,000 (p. 380). Changes were made in construction of the piers from brick to stone at an increased cost of $335 (p. 383). Changes were also made in the height of the ceil-

ings and in the material of the mantels, but everything appears to have been of this minor character.

In *Beers* vs. *Wolf & Strimple,* 116 Mo., 179, the contract was for the construction of a hotel for $31,000. The case was decided against the plaintiff on account of the failure of certain parties to the contract to sign the agreement for the alterations. The changes consisted of a change of six inches in the depth of the basement and in the depth of the closets, the cost of a bulkhead in the basement and the rearrangement of the closets on the second floor. The only cost referred to is a charge for plastering of $221.

In *McLennan* vs. *Wellington,* 30 Pac. (Kansas), p. 183:

> "A change was made in the plan of the building by moving the wall out two inches, and the specifications were changed by substituting walnut, cherry and poplar instead of pine in certain portions of the building."

We have now referred to every case mentioned by the Trial Court or known to us where changes have been made in a contract in pursuance of a provision looking to changes, and where this provision has been regarded as preserving the liability of the sureties, even though several of the cases were decided favorably to the sureties upon other grounds. In no one of these cases was the change involved anything more than a most trivial modification of the specifications. No case, so far as we know, has ever been decided by any Court which held that a modification involving an additional liability of $50,000, or anything like it, was included within the terms of such a stipulation. If the Court here decides that the provision for changes in the contract binds the surety to such vast requirements made entirely at the will of other parties, as are here pre-

sented, it will be the enunciation of an entirely new principle of law in reference to the liability of sureties.

In connection with this fact it must be remembered that every one of the cases cited stated that the contractor was required to make "any alterations or deviations" which the owner might impose. As we have already pointed out, the present contract does nothing of the sort. In the first place, it does not suggest any compulsory obligation on the part of the contractor or any limitation on his power as a voluntary agent. It merely says that changes which are made must be agreed upon in writing. Secondly, every one of the cases mentioned uses words which affirmatively and expressly include *all* changes, no matter how great, and expressly subjected the contractor to the obligation of making "all changes," without limit. There is no such comprehensive phrase in the contract at bar. In fact, there is no phrase that indicates affirmatively that the changes are without limit. The absence of a limit is something which is attempted to be read into the contract and which it does not contain.

POINT IV.

As Article VII. refers solely to changes in "plans and specifications," it has no bearing on the fundamental provisions of the primary contract, and therefore cannot apply to the change of location under the supplemental contract of August 17, 1893.

We again call attention to Article I. of the original contract, containing the general and primary designation of the structure for which this contract is made. This is the

fundamental provision of the contract, its kernel, that around which all the rest of it is a mere matter of detail. It is as follows:

> "*First*—The contractor will * * * construct and complete, ready to receive vessels, a timber dry dock to be located at such place *on the water-line* of the Navy Yard, Brooklyn, New York, as shall be designated by the party of the second part."

The supplemental agreement of August 17, 1893, undertook to change this fundamental provision of the contract by providing for a new location different from that described in Article I.

We ask the Court again to examine the phraseology of this agreement:

> "Whereas, it has been deemed desirable to change the location of the dry dock * * * this agreement witnesseth: * * * that the party of the first part * * * will, in the construction of the said dry dock, change its location to one 64 feet further inland."

The fundamental provision of the contract required that the dock should be located at the water-line. The dock built under this new agreement is not to be located on the water-line. It is a dock to be located 64 feet inland, with appropriate approaches. Nothing is to be found in the contract which permits a departure from this fundamental requirement that the dock shall be on the water-line, or which alludes to or includes or contemplates or refers in the remotest way to such a change of location.

Innumerable cases may be cited on the general question of the release of the surety by the changes in the contract. Thirty such cases are cited in the opinion of the learned Judge at Circuit and we have cited a number in Point I.

One of these, however, is especially pertinent at this point. In *United States* vs. *Boecker,* 21 Wall., 652, the sureties on a distiller's bond defended the suit on the ground that the bond had recited that the distillery was on one street corner, whereas the distillery was located on another corner, four blocks away, in the same town. The distiller had no other distillery than the one in suit. The Court said:

> "We think this term of the bond is of the essence of the contract. It is hardly less so than the amount of the penalty. One defines the place where the liabilities must arise, the other the maximum of that liability for which the sureties stipulated to be bound. The former can no more be held immaterial than the latter. No distillery having been carried on at the place named, the contract never took effect. The event to which it referred did not occur. There could consequently be no liability within the letter or meaning of the contract."
>
> *U. S.* vs. *Boecker,* 21 Wall., 652.

Whatever interpretation may be put upon Article VII., it is a provision which only affects changes in "plans and specifications." These "plans and specifications" are annexed to the contract and stated to be so annexed in the opening sentence of this very Article VII.

> "The construction of the said dry dock * * * shall conform in all respects to and with the *plans and specifications* aforesaid, which *plans and specifications* are hereto annexed," etc.

It is to these "plans and specifications"—and to them alone—that the possible changes in Article VII. refer. The language of the article is:

> "No omission in the *plans and specifications* of any detail," etc.

"Said *plans and specifications* shall not be changed in any respects except," etc.

"If, at any time, it shall be found advantageous or necessary to make any change, alteration or modification in the aforesaid *plans and specifications*," etc.

It is to nothing but to the "plans and specifications" that the question of changes, as it arises in Article VII., is in any way applicable.

Mention is made in the second proviso of Article VII. of "an enlargement or increase of dimensions"; but the "increase of dimensions" is only referred to as being one form of a change in "plans and specifications," which is to be treated as to the ascertainment of compensation in a specific way.

Article VII., therefore, does not suggest or refer in any way to a change in the contract itself; that is to say, the instrument to which the "plans and specifications" are annexed, and when it refers to the "plans and specifications," it refers to something distinguishable and distinct from that instrument. Nor is it any answer to say that the contract provides that "they (the specifications) shall be deemed and taken as forming a part of this contract with the like operation and effect as if the same were incorporated herein." This may make the "plans and specifications" a part of the contract in the sense that the contractual obligation extends to them, but it cannot make the contract a part of the "plans and specifications" in such a manner that provisions relating exclusively to such "plans and specifications" shall be held to relate to the fundamental provisions of the contract itself.

Assuming for the sake of argument—although we deny it—that Article VII., in terms, provided that the con-

tractor was compelled to agree to any change in "plans and specifications" that the Government might require and that the sureties should be bound by any such changes in "plans and specifications" that the parties might agree upon, the article would, nevertheless, be inapplicable to the terms of the contract itself as distinguished from the "plans and specifications," and with good reason. Whatever agreement two parties to a contract for construction work may make with the view of giving flexibility to the work, and providing for minor changes, and whatever agreement the sureties upon such a contract may accept as to their continued liability in the face of changes, there must still be some point at which the provisions of the contract are fixed and absolute. It is said with truth that changes are frequently required in the "plans and specifications" of constructive work, especially when such "plans and specifications" are not fully or carefully thought out at the beginning. It is even contended in the present case that where a provision is made in a contract for changes in "plans and specifications," such a provision should be held to cover changes of great magnitude; although we deny that any such changes are contemplated by the ordinary and usual expressions reserving to the owner the right to make changes, and much less by such expressions as are to be found in Article VII. But whatever changes are so contemplated, there is in every contract some limited, specific and definite thing which the contractor agrees to do and which the Government contracts to have done, and in reference to which neither party contemplates any change whatever. A contract to build a dry dock cannot be construed into a contract to build something else, whatever right to change the "plans and specifications" may be agreed to beforehand.

This is the case with the contract at bar. Even conceding to Article VII. the interpretation now claimed

for it by counsel for the Government, a point of fixity in the terms of the contract must still be determined. This point is absolutely marked out at least by the fundamental provisions of the contract itself. These provisions are unalterable, whatever may be done with "plans and specifications."

The intitial clause of the contract (Article I.) provides for the construction of a "dry dock." Assuming that Article VII. required the contractor to agree to changes in the "plans and specifications," it could not empower him to change the structure contracted for to anything but a dry dock.

The same elementary clause of the contract designated the structure as a "timber dry dock." No provision for alterations in the "plans and specifications" could have covered a change in this express and fundamental element of the contract so as to hold the sureties, for example, under a supplemental agreement to build a stone dry dock.

The same fundamental provision fixed the location of the timber dry dock. The contractor was to "construct and complete, ready to receive vessels, a timber dry dock to be located at such place *on the water line* of the Navy Yard, Brooklyn, New York, as shall be designated by the party of the second part." No alterations of "plans and specifications" could disturb this location, so far as it is fixed in the contract. The contractor could not be forced under this contract, whatever consent to a change in "plans and specifications" he had given beforehand, to build the dry dock anywhere except on the water line. The party of the second part was to designate the place on the water line, and this was done at the time when the primary contract was entered into; but once designated, the location could not be changed; certainly not to a point 64 feet inland. An agreement to construct a

dry dock elsewhere than on the water line was not an agreement for the performance of this contract. The agreement to change the location by moving the dock 64 feet inland was not a change in "plans and specifications," but was a recission of the contract of November, 1892, upon which the sureties had given their bond. The contract in question has never been carried out, because it has been abrogated by the mutual consent of the parties.

As it has been already said, it can readily be shown—and it is in fact shown by the contract of August 17, 1893 (Exhibit C)—that this change of location to a location 64 feet inland was a most material change. It was a change requiring new approaches of that length to be built. It was necessary to extend the channel of the Wallabout by that space into the land, making it of sufficient width for the purpose. The channel must obviously be in the neighborhood of 28 feet deep at low water and the banks must be so protected, either by sea-wall or sheet-piling, or other similar work, as to resist the action of the river and tides. The supplemental contract itself says (p. 12):

> "That he will perform all the additional excavation necessary at the entrance of the dry dock in consequence of the said change of location; also all the additional work necessary to lengthen the suction pipes provided to be laid from the present pump house, including the piping around piles, sheet piles, timber, iron-work, excavation and bank filling, etc., and all other work incident to said change of location, supplying all the labor and materials therefor."

It was certainly a very extraordinary contract that the Government induced this contractor to make. The parties seem to have been conscious that they were not mak-

ing a change in "plans and specifications," because their supplemental contract was completely oblivious of "plans and specifications." Here was an immense piece of work, obviously some 64 feet in length by 50 feet in width, in reference to the mode of carrying on which no specification was made whatever, but after a few general provisions, it was stated that the contractor was to do "all other work incident to said change of location, supplying all the labor and materials therefor." What the contractor might be consenting to do under that provision of the contract, or what he might be called upon to do in fulfillment of it, is not easy to say. The form of the supplemental contract showed a complete abandonment of all those safeguards in the way of detailed specifications, which constitute the most important protection of a contractor and of his surety. Even if the contract had not stated in Article I. that the dry dock was to be built on the water-line of the Navy Yard, even if the location had been a mere matter of "plans and specifications," which it is not, as the "plans and specifications" did not mention it, still, it could not be said that any fair interpretation of Article VII. implied that the sureties were to be bound without their consent by such a modification of the contract as this.

Here we come to another point bearing upon the theory that the sureties must be bound by any and all changes agreed upon between the owner and contractor. Article VII. required that any contract for changes should be agreed upon in writing. The new contract was made in writing, but with provisions so loose and vague that no one but a most reckless contractor would have consented to it in that form. The other party might exact almost anything under its broad provisions. It does not attempt to specify as the original contract specified. It cannot be said to contain specifications at all. With this contract

on his hands it is hardly to be wondered at that the contractor defaulted. Had not the surety a right to see this written contract before he was committed to it? Had he not a right to protection even though this foolish contractor neglected to secure protection for himself? Do the language of the contract and bond express any intention on the part of the surety to consent that the contractor should bind himself by any loose and improvident form of agreement that might be suggested to him, especially when it did not relate to any item in the plans and specifications, but constituted a vast amount of new work entirely outside the plans and specifications under such a comprehensive phrase as "all the work incident to said change of location?" If such is to be the construction of the contract as against the surety, it must be founded upon a clear expression of intention in the instrument itself.

The question of the effect and extent of the change, however, is not here of importance. Where a surety has not consented to a change he is released, whether the change is large or small, material or immaterial, whether it inures to the benefit or injury of the contractor. The fact is that, in this case, these sureties only guaranteed a contract to build a timber dry dock *on the water-line* of the Brooklyn Navy Yard, and whether or not they may have agreed to any change with reference to "plans and specifications," and what the nature of that agreement was, or however it must be understood to be limited, they certainly never agreed to any departure from the fundamental terms of the contract itself, to wit, a contract to build a timber dry dock on the water-line of the Navy Yard. The location was fixed on the water-line in the contract itself, and was above and beyond all provisions in the "plans and specifications." It could not be changed without the abrogation of the original contract and the execu-

tion of a new contract. As well might it be contended that the Government might under this contract have applied to the contractor to build a dry dock on Staten Island, or to build a stone dock for a timber dock, or a wet dock like the Erie Basin in place of a dry dock, or no dock at all, but a wharf, or to build two docks in place of one. These are changes in the fundamental contract not in the "plans and specifications." Even on the theory of "contemplated changes," these changes were evidently not contemplated. Neither the Government nor the contractor nor the sureties "contemplated" the construction of anything but a dry dock and a timber dry dock, and a timber dry dock located on the water-line of the Brooklyn Navy Yard. The Government and the contractor can no more hold the sureties after changing their agreement in respect to location than they could have held them after a change from timber to stone as the material of construction, or after a change from a dry dock to some other structure.

Suppose that an ordinary building contract provided that the contractor agreed to build a house on a certain lot. Could it be contended that the sureties were liable under a new agreement made nine months after the work was started between the owner and contractor to build instead on another lot, whatever provision might be made in the original contract for changes in "plans and specifications?"

The plaintiff contended in the Court below that

> "The claim made by the defendant that the provision contained in the second supplemental contract is a change in the contract itself, and therefore not covered by the Seventh paragraph of the contract, is untenable. But the plans and specifications are a part of the contract, and even if there had been

a change in the plans and specifications, it would have been such a change as was authorized by the contract itself."

Assuming that this was true, it does not affect the question, for the change was not a change in the plans and specifications. It was a change in the primary contract, to which the plans and specifications were annexed and of which they were said to form a part; but it does not follow that the contract became a part of the plans and specifications and that the change in the contract was a change in the plans and specifications.

The plaintiff further contended, in view of the provision of the contract that the dock was "to be located at such place on the water-line of the Navy Yard as should be designated by the party of the second part," that the provision would "permit the dry dock to be located anywhere within the entire limits of the Navy Yard, so long as it was accessible to the water"; the idea being that the word "at," as here used, merely means "near to" or "in proximity with" the water, and that to make a dry dock available it must anyway be at or near the water. The learned counsel further said that he considered the changes made by the supplemental agreement were not really changes in the contract or in the "plans and specifications," "but were rather an attempt to render clear some of the points which were not fixed and determined when the contract was drawn." He added, "The location of the dry dock was a matter of uncertainty, for, except that it was built at the Navy Yard, this contract provides that its precise location was to be designated by the party of the second part or the Government. In fact, all that the contract really provides in this regard is that the dry dock shall be constructed so that it will be reasonably accessible to the water. Hence the so-called changes * * * should

be regarded as the only definition" of the terms of the contract, etc., etc.

In his argument below the learned counsel seemed to think that the designation made in this supplemental contract was the first designation of a location that was made by the Secretary of the Navy. In this, as already shown, he was mistaken. The contract of August 17, 1893, is not an agreement to fix the location of the dock, but to change the location. It says (p. 11):

> "Whereas, it has been deemed desirable *to change the location* of the dry dock *now being constructed* at the Navy Yard."

Again, at page 12, the supplemental contract provides that the contractor "will in the construction of the said dry dock, change its location to one 64 feet further inland than that laid down and staked out when the said contract was entered into." It thus appears that, not only had the site been fixed by the Navy Department, but it had been laid down and staked out at the very time when the original contract was entered into in the previous November, and had remained fixed for nine months at that spot, and that the change of location now ordered was not only a change in location from that designated at the date of the contract, but it was also 64 feet inland from the water line, on which alone the Government could designate the site. So vital was this question of site that it appears from Article I. of the contract that the possession and occupancy of the site were to be delivered by the Government to the contractor; that he was to begin work twenty days after such delivery, and that said possession and occupancy were to be secured to him during the period of construction and until completion and delivery of the work; that the work, as stated in the contract of August 17, 1893, was then under construction, and consequently that the

contractor was then, and had been ever since the beginning of the work, in the possession and occupancy of the site, and that this change of location involved his delivering up the possession and occupancy of that site and taking the possession and occupancy of another site 64 feet inland and not on the water line, as the contract required. What is meant by saying that the location of the dry dock was a matter of uncertainty, it is difficult to see. It makes no difference what meaning may be attached to the word "at." Counsel undertakes to say that it means "near" or "in proximity to." The words of the contract are "*at* such place *on* the water line as may be designated by the Secretary of the Navy." It is difficult to believe that the contractor was to be allowed to build the dock anywhere "near" such place or "in proximity to" such place as might be designated on the water line by the Secretary. It is obvious that he was to build the dock not "near" the place designated, but on the lines of the very stakes.

As to the suggestion that any dry dock, to be useful, must be accessible to the water, and therefore, in a certain sense, near the water, we hardly think that it requires an answer. "On the water line" has but one meaning. Ascertain the water line and you ascertain one limitation as to the location at which that dry dock was to be built. The other is simply the position that the Secretary of the Navy may choose on that line. But a dock built on the water line is not a dock built inland with approaches contemporaneously constructed to connect it with the water.

Plaintiff seemed also to contend that there is some indefiniteness about the phrase "on the water line," because of a supposed difference between high and low water mark.

It is difficult to see what indefiniteness is created in the use of the expression "water line" by the differences of high and low water. Whether the water line is high-water mark or low-water mark is immaterial, as the difference between "the water line" and "64 feet further inland from the water line" is equally great whichever mark is taken. As a matter of fact, the sea-wall surrounding the Navy Yard makes high-water mark and low-water mark one and the same water line.

As to the fact that the formation of the land makes part of the Navy Yard an island with a navigable channel around it, and that therefore its water line is a mile in extent—this does not affect the question. If the water line were ten miles in extent or a hundred miles in extent the change from a dock on the water line to a dock 64 feet further inland would be equally great wherever on the water line the original location might have been fixed.

The plaintiff in error attempts, in Point I., to draw an analogy between the case at bar and that of Simpson *vs.* the United States, 31 Ct., Claims Rep., 217, confirmed 172 U. S., p. 372. In that case the contract provided for the construction of a timber dry-dock, "to be located at such place on the water-line of the Navy Yard, Brooklyn, New York, as shall be designated by the party of the second part"; and in the specifications it was provided that the dock should be built "upon an available site to be provided by the Government."

The qualifying clause, which materially extended the discretion of the Government, and gave notice to the surety that his risk was less well defined than in the case at bar, was "upon an available site to be provided by the Government." It was held in the Simpson case that the Government did not guarantee the character of the soil

underlying the site; that the contractors could not recover for extra work caused by the character of the soil underlying the site chosen by the Government on the theory, which it was claimed supported that contention, that the word "available" was a representation by the Government as to the condition of the soil; that the site should be available from the standpoint of the contractors in affording them opportunity to construct the work with the minimum amount of inconvenience.

The counsel for the plaintiff in error then goes outside the record and argues at great length as to the considerations present when a work of this character is undertaken.

All this is beside the question. The question here presented, and the only question, is that the contract provided for the building of a timber dry-dock on the water-line, at some point to be thereafter designated. This fixed the location to that extent: the location must be on the water-line. Any subsequent designation of the exact locality must still be "on the water-line." However, a supplemental contract of August 17, 1893, substituted a new location "64 feet further inland" and awarded the contractor over $5,000 additional compensation for the work. It was a change which cannot be justified as a modification of the plans and specifications within the meaning of Article Seventh, for it provided for an alteration in the location of the structure itself, which location is no part of the plans and specifications, but has its own distinct place in the contract. It has been fully demonstrated in the preceding points that any change, however small, in the terms of a contract, the performance of which is guaranteed by a surety, even though it be for the surety's benefit, releases him, unless he assent to the change. Much more is this true when the changes are of such magnitude and character as those provided for by these supplemental contracts.

POINT V.

Even if the changes in the supplemental contracts were in other respects such as to sustain the liability of the sureties, the supplemental contracts on their face fail to fulfil the requirements of Article Seventh.

The requirements of Article VII. as to the new agreements are plain and specific. The change must be agreed upon in writing by the parties to the contract, and the agreement must "set forth fully the reasons for such change."

Neither of the agreements in question, Exhibits B and C, sets forth anything as to the reasons for the changes therein prescribed.

It has been repeatedly held that specific requirements of this character must be literally complied with. Thus, where the original contract requires the contractor to make any and all changes, and that the change shall be set forth in writing, alterations made pursuant to verbal agreements or directions release the surety.

In the case of *Eldridge* vs. *Fuhr*, 59 Mo. App., 44, the contract said:

> "The owner reserves the right * * * to order through the architect any change in the work without impairing the contract, the value of such changes to be mutually agreed on in writing between the architect and contractor beforehand."

It was also stated that the alterations should be upon the written order of the owner (pp. 47–48). The Court said:

> "By the express terms of the contract the plaintiff reserved the right, by the observation of certain for-

malities, to order changes in the building. If these formalities had been observed it is clear that the original contract would have been in no way changed, and the sureties would have remained bound. But it is undisputed that in ordering the additions the contract was disregarded."

The Court then cites *Beers* vs. *Wolf*, 116 Mo. App., 179, and *Killoren* vs. *Meehan*, 55 Mo. App., 427, in which a similar question was presented, where it was decided that the surety was released. Of the decision in *Beers* vs. *Wolf* the Court said:

"It appeared that various changes had been made in the work, but that in making the changes the conditions of the contract had not been observed, and there was no evidence that the sureties consented to the changes. The Court held that the sureties were released."

As to the *Killoren* case, it thus refers to the decision:

"We decided that if the changes were made under the contract and the conditions had not been complied with the surety could not be held. The foregoing decisions rest on the principle of law, which is universal, that the surety has a right to stand on the strict letter of the contract."

The Court goes on:

"In the case at bar the additions to the work were made solely on the verbal order of the plaintiff. This was in direct violation of the conditions of the very contract for the performance of which the sureties were bound. As the alterations were made without the consent of the sureties, it follows that they are released."

The alterations in question consisted of the addition of two doors, the construction of a skylight and the use of certain cement, of the total value of $52.70 (p. 47).

The provision of Article VII., requiring that the reasons for a change should be fully set forth in writing, cannot be said to be a provision that was adopted solely in the interest of the owner. If it was adopted for the owner's benefit at all, it was only to protect him against the act of his own agents; but it was much more for the protection and security of the contractor. It at least limited changes that might be made to such as were capable of being supported by specific reasons. That being the case, and the requirement of Article VII. being express and indispensable, and this requirement having been disregarded in making the supplemental contracts, and the sureties not having consented to the changes provided for therein, the changes, even though compulsory upon the contractor, were not embodied in contracts fulfilling the required conditions.

POINT VI.

Prior to the execution of this contract the Government adopted and officially promulgated a final interpretation of Article Seventh, or of a similar provision, to the effect that changes made in a contract under such a provision do not bind the sureties.

In 1885 the question was presented by the Secretary of the Navy to the Attorney-General of the United States as to the power of said Secretary to modify the contract for building new cruisers under the Act of August 5, 1882, and the Attorney-General, Honorable Benjamin H. Brew-

ster, replied that, while it was competent for the Secretary to assent to such a modification:

> "I may add here that the assent of the contractor's sureties should be obtained to any change in the contract which affects them before the same is consummated."
>
> 18 Opinions Attorneys-General, 101.

The provisions of the contract referred to were laid down in the Act of August 5, 1882, United States Statutes at Large, 82, chapter 391, page 292, and evidently served as the model upon which Article VII. and similar subsequent provisions were drawn. The similarity of the two provisions is shown by the following extracts:

ARTICLE VII.

> "The said plans and specifications shall not be changed in any respect except upon the written order of the Bureau of Yards and Docks; and that if at any time it shall be found advantageous or necessary to make any change, alteration or modification in the aforesaid plans and specifications, such change, alteration or modification must be agreed upon in writing by the parties to the contract, the agreement to set forth fully the reasons for such change, and the nature thereof, and the increased or diminished compensation, based upon the estimated actual cost thereof which the contractor shall receive, if any: Provided, That whenever the said changes or alterations would increase or decrease the cost by a sum exceeding five hundred dollars ($500), the actual cost thereof shall be ascertained, estimated and determined by a board of naval officers to be appointed by the Secretary of the Navy for the purpose, and the contractor shall be

bound by the determination of said board, or a majority thereof, as to the amount of increased or diminished compensation he shall be entitled to receive in consequence of such change or changes."

ACT OF AUGUST 5, 1882.

"And after said drawings and specifications have been provided, adopted and approved as aforesaid, and the work has been commenced or a contract made for it, they shall not be changed in any respect, when the cost of such change shall in the construction exceed five hundred dollars, except upon the approval of said board, or a majority of the members thereof, in writing, and upon the written order of the Secretary of the Navy; and, if changes are thus made, the actual cost thereof and the damage caused thereby, shall be ascertained, estimated and determined by said board; and in any contract made pursuant to this act it shall be provided in the terms thereof that the contractor shall be bound by the determination of said board, or a majority thereof, as to the amount of the increased or diminished compensation said contractor shall be entitled to receive, if any, in consequence of such change or changes."

It appears from the above that Mr. Attorney General Brewster in holding that the Secretary of the Navy should obtain the assent of the contractor's sureties to any change before the same is consummated was interpreting provisions precisely similar to those now under consideration. In making the changes of 1893 in the dry dock contract, the Government could and should have endeavored to have obtained this assent. Had the effort been made it might well have been that the Government would not have obtained it from the present surety, as a refusal would have been within his rights. Had it obtained the assent, or

failing that, the substitution of other sureties upon the bond, the question would not now have arisen.

The fact is that the proceedings in respect to these two changes in the dry dock contract were of a very unusual character, and it is hard to understand how the Bureau of Yards and Docks could have omitted in this case to take a simple precaution which is substantially universal in the transaction of Government business, namely, to obtain the consent of the sureties to all changes, even minor changes, or failing that, to obtain the substitution of other sureties upon the bond. It is especially difficult to account for this omission in a case where the changes were of such extraordinary magnitude. It very rarely happens, as the review made above of the reported cases shows, that changes even in plans and specifications of such an extensive character are made as that referred to in the first supplemental contract, and it is almost unheard of that a change should be made in the underlying provision of the contract itself like that which moved the location of the dry dock 64 feet from the water-line. It is inconceivable that such attempts as these to alter the liability of the contractor and of the surety should have been made without any reference to the surety at all, as if he was a party who had no interest whatever in the transaction.

Another instance of the extraordinary looseness with which this business was conducted is the fact that the change of location of all the work that it involved in making the channel in the wall about by which the dry dock was to be approached, with all its accompanying piping, round piles, sheet piling, timber, construction, iron-work and back filling should have been contracted for without any specifications at all and nothing but a mere provision that the contractor should perform all this and the other work "incident to such change of location." The looseness is as remarkable on the part of the contractor as it is

on the part of the Government. There is, of course, however, nothing to prevent a contractor from making contracts in such form if he desires, but such contracts cannot bind a surety unless he consents to them.

POINT VII.

The original construction contract was abrogated by the supplemental contracts, and as the complaint did not allege a new contract of suretyship, guaranteeing the new construction contract, the demurrer was properly sustained.

It is stated in the brief of counsel for the government that

> " the defense relied upon by the defendant in error should have been set up by answer, and not by demurrer. The complaint of the plaintiff recites the original contract and two supplemental contracts, and the bond, charging that the bond is a part of the contract, has as much application to the supplemental contracts as to the original. This was all the plaintiff was required to do in his pleading. The rule of law is that any substantial change made in a contract without the knowledge and consent of the surety will release the surety from his obligation ; but want of knowledge and assent is an affirmative defense to be set up by the defendant and is not required to be traversed by the plaintiff in his declaration in anticipation."

We submit to the court that there is an entire confusion of ideas in this statement in regard to the meaning of the cause of action in this case. The complaint

must set up a contract of suretyship between the plaintiff and the defendant surety. The point is not that the complaint must traverse by anticipation the allegation of non-assent, but that the complaint is bound to state the contract upon which the cause of action is based. If it is a contract of suretyship on the original construction contract, that is one thing. If it is a cause of action on a different construction contract, that is another thing. It must set up the contract on which it relies. In the present case the plaintiff has set up the contract of suretyship conditioned for the fulfillment of the original construction contract. Then it sets up that the original construction contract was abrogated by certain changes and modifications. This, as we claim, is ground for demurrer. No other cause of action is stated but that on the original bond and the original contract, which the pleading likewise states is abrogated. Under those circumstances, the contract pleaded is not the contract upon which the plaintiff intends to sue, and he cannot recover upon any imaginary new contract of suretyship conditioned for the fulfillment of the new contract of construction. He must plead the new contract. If he is to recover on the new contract he must plead it in terms.

The complaint must set up a contract of suretyship between the plaintiff and the defendant. The particular contract of suretyship set up is conditioned for the fulfillment of a construction contract between the plaintiff and the contractor to build a certain dry dock. It was necessary, of course, to plead the contract of suretyship, and it was necessary to plead the construction contract which the contract of suretyship was alleged to guarantee. Had there been no question of a change, the plaintiff could, by alleging the contract of suretyship and the non-fulfillment of the construction contract, have made his cause of action. But he was

unable to do this. He pleaded the contract of suretyship and the construction contract upon which it was based, and thereupon in his pleading alleged the abrogation by mutual consent of the plaintiff and the contractor of the original contract of construction. Having alleged this, the condition of the bond, namely, the non-fulfillment of the contract of construction could not arise, because of its abrogation by consent. Of course, a modification in the contract is an abrogation of the original contract, unless the original contract is in itself broad enough to cover the modifications. Assuming, as is assumed by the third point (of the government) for the purposes of argument, that the original contract was not broad enough to cover the changes, the changes, of course, made a new contract, and if the changes had been assented to by the surety—in other words, if the surety had assented that his bond should apply to the modified contract, he made a new contract of suretyship, namely, a bond conditioned upon the non-fulfillment of a different construction contract from that referred to in the original bond. Under these circumstances, if the recovery is to be upon this new contract of suretyship, it should have been pleaded. Otherwise, the plaintiff would not have stated his cause of action.

To say that the defendant, when he is sued upon a certain contract of suretyship which the complaint shows upon its face was abrogated by consent, must in his defense set up that he did not execute some other contract of suretyship which has not, as a matter of fact, been alleged, is a proposition which we do not believe will receive the assent of any court.

Accordingly, in examining the complaint, we find that it alleges that on the 17th of November, 1892, the defendant, Gillies, entered into a contract for the construction of a dock, said contract being appended, and

that the defendant, Freel, executed a bond conditioned upon the performance of the contract of Gillies. It thereupon alleges that the contract of Gillies was changed and modified by certain agreements, which are set forth, and it alleges the liability of all the defendants in a certain sum.

Now, the only contract of the defendant Freel, which is here pleaded is a contract of suretyship conditioned upon the non-performance by Gillies of his contract of the 17th of November, 1892; but it is alleged that new contracts were entered into in 1893 which were a modification of the original Gillies contract—in other words, that the original Gillies contract was abrogated by the consent of the plaintiff and the defendant, Gillies. Under this state of facts, it becomes evident that the plaintiff has no cause of action against the defendant, Freel, upon the original contract of suretyship, for this was conditioned upon the fulfillment of a construction contract which the parties agreed to terminate. Obviously, here there is no cause of action alleged.

The fact that the government and Gillies subsequently made a new contract which reproduced a great part of the former contract—all, in fact, of the former contract, except the specified modifications, does not affect the question. It is, in fact, a new contract. If the plaintiff seeks to recover against the defendant, Freel, as surety upon the new contract, it must plead a contract of suretyship between him and the government as to that contract; and if it fails so to plead it does not allege a cause of action.

All that it has alleged in the complaint and in the record is, that Freel made a contract of suretyship with the government, conditioned upon the faithful performance of the Gillies contract, which contract it states in terms was abrogated. Under these circum-

stances can it possibly be asserted, or could it possibly be directed by any court that it was necessary for Freel, in order to dismiss the complaint, to plead that he did not enter into some contract not stated in the complaint, not anywhere alleged in the action, different from that which is pleaded? There could be no foundation whatever for such a pleading? The defendant cannot be called upon to deny the existence of a contract which is not alleged, and certainly no contract is here alleged, except the original contract of suretyship relating to the original contract of construction.

The claim which we have here made is the familiar contention, supported by innumerable authorities, that a change in the contract releases the surety. The surety has a right to say, when called upon to fulfill his guarantee of the contract after a change: "This change makes a new contract. It abrogates the old contract. I guaranteed the old contract. I did not guarantee the new contract." *Non hæc in foedera veni.*

"No principle of law is better settled at this day," said Mr. Justice Lumpkin, in Bethune *vs.* Dozier, 10 Georgia, 235, "than that the undertaking of the surety being *strictissimi juris*, he cannot, either at law or in equity, be bound further or otherwise than he is by the very terms of his contract. * * * Neither is it of any consequence that the alteration of the contract is trivial, nor even that it is for the benefit of the surety. *Non haec in foedera veni* is an answer in the mouth of the surety from which the obligee can never extricate his case, however innocently or by whatever kind intention to all parties he may have been actuated. * * * He is not bound by the old contract, *for that has been abrogated by the new;* neither is he bound by the new contract, because he is no party to it; neither can it be split into parts so as to be his contract to a

certain extent, and not for the residue; he is either bound *in toto*, or not at all."

Bethune *vs.* Dozier, 10 Ga., 235. Approved in Brandt on Suretyship, 2nd Ed., Vol. 2, p. 566.

POINT VIII.

Demurrer was the proper way in which to raise the contention of the Defendant in Error.

The remarkable contention is made in Point III. of the brief for the plaintiff in error that the demurrer in this case should have been overruled, for the reason that the defense relied upon by the defendant in error should have been set up by answer and not by demurrer. The case relied upon is Shepard *vs.* May, 115 U. S., page 505, where it is stated by Mr. Justice Woods: "But even if it had been shown that Shepard had become the surety of Walker, it was incumbent on the former to show, as a part of his defense, that the indulgence by May to Walker was without his assent. Sprigg *vs.* Bank of Mount Pleasant, 14 Peters, 201; Bangs *vs.* Strong, 7 Hill, 250; S. C., 42 Am. Dec., 64; Cox *vs.* Mobile, etc., Railroad Co., 37 Alabama, 320. There was no proof of want of assent. The defense therefore failed."

It is not difficult to dispose of this case as an authority against the defendant in error:

1. The part of the opinion relied upon is merely *obiter*. The proposition advanced had nothing to do with the decision of the case. It is merely a sugges-

tion as to what principle might have been applicable upon another state of the proof.

2. The cases there cited by the Court do not sustain the principle. The most that can be said of these cases as declaring such a rule is that they were in fact tried, and proof was, in fact, advanced by the surety or guarantor that he did not assent to the changes. No conclusion can be deduced that the burden of proof rested upon him. The cases throw no light on the subject.

In Sprigg *vs.* Bank of Mount Pleasant, cited by the Court in Shepard *vs.* May, Sprigg was seeking relief from liability as surety, when, in fact, by the express terms of his obligation, he was a principal, and it was on proof of his capacity as principal that he was denied relief as surety.

The dictum in Shepard *vs.* May finds no support either in the language of this decision or the principal which the judgment declares.

Bangs *vs.* Strong cited by, the defendant in error upon this proposition, discloses nothing as to which party at the trial offered proof of want of the surety's consent. The opinion merely states: "This agreement was made between the creditors and the principal debtor without the consent of the surety." This conclusion might have been reached if issue had been joined by demurrer, as in the present case. Upon demurrer, the facts alleged in the pleading demurred to. stand, for the purposes of the decision, as admitted, If in the pleading demurred to there is no allegation of consent by the surety, the Court must dispose of the case upon the theory that no consent was, in fact, given. There is no presumption that the surety assented to the changes.

Cox *vs.* Mobile, etc., R. R. Co., 37 Ala., at 320, another case cited by the Court in Shepard *vs.* May, to sustain this dictum, contains no suggestion of the conclusion deduced from it by the Court. It appears that at the trial the surety defendant did, in fact, introduce evidence that he did not consent to the extension granted to his principal, upon a promissory note upon which the action was brought. But the decision in no sense lays it down as a rule of evidence that the burden of making this proof was upon the surety.

These are all the cases upon which the Court bases this dictum. If given the effect for which the Attorney General contends, a new rule of evidence, directly contrary to that laid down by a long line of decisions, would be established. The Court was not required, in order to decide the case on its merits, to declare any rule of evidence whatever. It merely volunteered a suggestion as to what rule might apply in another case.

In this case, the complaint alleges (page 1) that John Gillies and the United States agreed in writing to change and modify the original plans and specifications by two certain contracts made and executed, respectively, on the 16th day of June, 1893, and the 17th day of August, 1893. Consent of the surety is not alleged. By demurrer, the defendant, surety, admitted the changes but denied his liability. This brought squarely before the Court the question: Were the changes of such a nature that the surety was released?

It has repeatedly been held that the burden of proof to show want of knowledge or assent on the part of the surety of alleged changes in the contract, is not upon the surety. It is presumed, in the absence of direct proof to the contrary that the surety has not assented.

In the case of Mundy *vs.* Stevens, 61 F. R., p. 85, it is stated by Mr. Justice Acheson:

> "Nor can we assent to the proposition that the burden of proof was upon the sureties to show that the alteration of the agreement of February 2, 1892, was without their consent. The cases cited in support of this position are inapplicable, for the sureties were not the actors. The plaintiff set forth the supplementary agreement of June, 1892, in his statement of claim, made it part of his case and introduced it in evidence. The burden of proof, therefore, was upon him (Whart. on Ev., 357). We are unable to find in this record any evidence tending to show that John M. Sharp assented to or even had knowledge of the alteration of the agreement."

In the case of United States *vs.* M'Intyre, 111 Federal Reporter, at 597, it is said by Mr. Justice Riner:

> "At the hearing, application was made by the defendant to amend his answer, setting up certain matters with which counsel are familiar, by way of affirmative defense. The Court is of the opinion, however, that this is unneces sary, and we cannot assent to the proposition that the burden of the proof is on the surety to show that the alterations in the contract were made without its consent."

In the case of Tuohy *vs.* Woods, 55 Pac. Rep., 683, the Supreme Court of California, by Mr. Justice McFarland, said:

> "When the surety has shown that the contract as to which he became surety has been changed, he has then shown that there has been an attempt to make him liable *on a new and different contract,*

and the burden is then upon the other party to show that the surety has consented to the new contract."

Again, in the case of Stowell *vs.* Goodenow, 31 Me., at 540:

"The wrong and injury to the surety consists in a change of the contract, and of the relations between the creditor and his principal debtor. It is this which discharges the surety. When proof of it has been made, the creditor can be relieved from the effect of it upon his rights, by saying that the surety has assented or waived all objection to it. The surety could not ordinarily be able to prove that he did not assent to it when made without his knowledge. The proof should come from the party who would be relieved from the consequences of his wrongful act."

The Court of Appeals of the State of New York, in the case of Calvo *vs.* Davies, 73 N. Y., 211, declared the same principle in affirming a judgment in favor of a surety rendered upon his demurrer to the complaint in an action precisely similar to the one here before the Court. In this case the Court said, by Mr. Justice Andrews:

"The plaintiff, in her complaint in this case, sets forth facts which justify a judgment of foreclosure; but she also demands a judgment for any deficiency against the defendant Davies. The defendant Davies interposed a general demurrer to the complaint. The plaintiff avers the making of the bond and mortgage by Davies, its assignment to the plaintiff, the conveyance by Davies to Leslie in November, 1871, of the equity of redemption, subject to the mortgage, and his agreement to pay the same, and the amount due and unpaid thereon.

If the plaintiff had stopped here, a cause of action against the defendant would appear in the complaint; but she further alleges that in November, 1872, by an agreement made by the plaintiff with the defendant Leslie, the time for the payment of the debt was extended from March 8, 1872, to October 15, 1872. * * *

"The agreement, if construed as an absolute agreement for the extension of the time of payment of the mortgage, *prima facie* operated to discharge Davies from liability on his bond. * * *

" The further point is taken by the plaintiff that the averment of the agreement of extension may be rejected, leaving it for the defendant to bring the agreement to the notice of the Court by answer. But we think the whole complaint is to be considered in determining whether it states a cause of action, as well the allegations which tend to discharge the defendant Davies as those which tend to charge him. These views lead to an affirmance of the judgment."

Calvo *vs.* Davies, 73 N. Y., 211.

POINT IX.

The judgment should be affirmed.

James Russell Soley,
Of Counsel.

Supreme Court of the United States.

No. 224.—October Term, 1901.

The United States, Plaintiff in Error, vs. Edward J. Freel, as Executor of the last will and testament of Edward Freel, deceased.	In error to the United States Circuit Court of Appeals for the Second Circuit.

[June 2, 1902.]

Mr. Justice Shiras delivered the opinion of the Court.

In September, 1898, the United States of America brought an action in the Circuit Court of the United States for the Eastern District of New York against John Gillies, Henry Hamilton and Hugh McRoberts, Catharine Freel, Edward J. Freel and Frank J. Freel, as executors of Edward Freel, deceased.

The complaint alleged that theretofore, and on the 17th November, 1892, the defendant John Gillies entered into a contract in writing with the plaintiff to construct a timber dry dock, to be located at the United States Navy Yard, Brooklyn, New York, according to certain plans and specifications attached to and made part of said contract; that on said 17th November, 1892, the said John Gillies, as principal, and Henry Hamilton and Hugh McRoberts, and Edward Freel, as sureties, executed their joint and several bond to the United States in the penal sum of $120,600, conditioned for the faithful performance by the said Gillies of his contract to construct said dry dock; that Gillies entered upon the performance of said contract; that subsequently, on June 16, 1893, Gillies and the United States agreed in writing to change and modify the plans and specifications so as to increase the length of said dry dock from six hundred to six hundred and seventy feet; that on August 17, 1893, Gillies and the United States further agreed in writing to change and modify the contract in certain particulars; that Gillies proceeded with the work under said original and supplemental contracts so slowly, negligently and unsatisfactorily that the Secretary of the Navy, under the option and right reserved to him by the said contract, declared the said contract forfeited on the part of said Gillies; that thereupon, by a board duly appointed, the market value of the work done and of the materials on hand was appraised at the sum of $170,175.40; that thereafter, under the provisions of said contract, the Secretary of the Navy proceeded to complete said dry dock and appurtenances in accordance with the said contracts, plans and specifications, at a cost to the United States of the sum of $370,000; that the sum of $72,414.16 represented the damages

sustained by the plaintiff by reason of said Gillies' breach of contract; that Edward Freel died on the 24th day of December, 1896, leaving a last will appointing Catharine Freel, Edward J. Freel and Frank J. Freel executors thereof; that the said defendant John Gillies neglected and refused to perform the terms and conditions of said contract on his part, and that the plaintiff has performed, fully and completely, all the terms and conditions of said contract on its part. Wherefore the plaintiff demanded judgment against the said defendants in the said sum of $72,414.16 with interest from April 1, 1897.

On November 26, 1898, Edward J. Freel, as executor of Edward Freel, deceased, appeared and demurred to the complaint upon the ground that it appeared upon the face thereof that said complaint did not state facts sufficient to constitute a cause of action. On May 24, 1899, after hearing the counsel of the respective parties, the Circuit Court sustained the demurrer, and dismissed the complaint as to said Edward J. Freel as executor. (92 Fed. Rep. 299.) The case was taken to the Circuit Court of Appeals for the Second Circuit, and on January 5, 1900, that court affirmed the judgment of the Circuit Court. (99 Fed. Rep. 237.) On December 22, 1900, a writ of error was allowed, and the cause was brought to this court.

The question in this case is whether a surety on a contractor's bond, conditioned for performance of a contract to construct a dry dock, was released by subsequent changes in the work made by the principals without his consent.

As the question is presented to us on a general demurrer to the complaint, it is necessary to set forth, with some particularity, portions of the original and of the supplemental contracts, which form parts of the complaint.

The original contract, dated November 17, 1892, contained, after alleging that proposals had been made and accepted for the construction by contract of a timber dry dock, to be located at the United States Navy Yard, Brooklyn, New York, the following provisions:

"First. The contractor will, within twenty days after he shall have been tendered the possession and occupancy of the site by the party of the second part, which possession and occupancy of the said site during the period of construction and until the completion and delivery of the work hereinafter mentioned, shall be secured to the contractor by the party of the second part, commence, and within twenty-seven calendar months from such date, construct and complete, ready to receive vessels, a timber dry dock, to be located at such place on the water line of the navy yard, Brooklyn, N. Y., as shall be designated by the party of the second part."

* * * * * *

"Seventh. The construction of said dry dock and its accessories and appurtenances herein contracted for shall conform in all respects to and with the plans and specifications aforesaid, which plans and specifications

are hereto annexed and shall be deemed and taken as forming a part of this contract with the like operation and effect as if the same were incorporated herein. No omission in the plans or specifications of any detail, object or provision necessary to carry this contract into full and complete effect, in accordance with the true intent and meaning hereof, shall operate to the disadvantage of the United States, but the same shall be satisfactorily supplied, performed and observed by the contractor, and all claims for extra compensation by reason of or for or on account of such extra performance are hereby, and in consideration of the premises, expressly waived; and it is hereby further provided, and this contract is upon the express condition, that the said plans and specifications shall not be changed in any respect except upon the written order of the Bureau of Yards and Docks; and that if at any time it shall be found advantageous or necessary to make any change, alteration or modification in the aforesaid plans and specifications, such change, alteration or modification must be agreed upon in writing by the parties to the contract, the agreement to set forth fully the reasons for such change, and the nature thereof, and the increased or diminished compensation, based upon the estimated actual cost thereof, which the contractor shall receive, if any: *Provided*, That whenever the said changes or alterations would increase or decrease the cost by a sum exceeding five hundred dollars ($500) the actual cost thereof shall be ascertained, estimated and determined by a board of naval officers to be appointed by the Secretary of the Navy for the purpose; and the contractor shall be bound by the determination of said board, or a majority thereof, as to the amount of increased or diminished compensation he shall be entitled to receive in consequence of such change or changes: *Provided further*, That if any enlargement or increase of dimensions shall be ordered by the Secretary of the Navy during the construction of said dry dock, that the actual cost thereof shall be ascertained, estimated and determined by a board of naval officers, to be appointed by the Secretary of the Navy, who shall revise said estimate and determine the sum or sums to be paid the contractor for the additional work that may be required under this contract: *And provided also*, That no further payment shall be made unless such supplemental or modified agreement shall have been signed before the obligation arising from such change or modification was incurred and until after its approval by the party of the second part: *And further provided*, That no change herein provided for shall in any manner affect the validity of this contract."

The supplemental contract of June 16, 1893, contained, among other things, the following:

"This agreement, entered into this 16th day of June, 1893, between John Gillies, contractor, for the construction of a dry dock at the U. S. Navy Yard, Brooklyn, New York, party of the first part, and Norman H. Farquhar, Chief of the Bureau of Yards and Docks of the Navy Department, for and in behalf of the United States, party of the second part,

"Witnesseth: That, whereas, the Navy Department has decided to lengen then the said dry dock from six hundred (600) feet, as called for in the specifications forming a part of the contract for the construction of a dry dock at the above-mentioned location, entered into by the above-mentioned parties of the first and second parts on the 17th of November, 1892,

to six hundred and seventy (670) feet from the outer gate sill to the coping at the head of the dock.

"And, whereas, a board of naval officers, consisting of Captain J. N. Miller, U. S. N., Civil Engineer P. C. Asserson, U. S. N., and Civil Engineer, F. C. Prindle, U. S. N., was ordered by, and did convene, by order of the Secretary of the Navy, in compliance with the requirements of paragraph 7, page 2, of the contract, to fix this additional compensation to be allowed to said party of the first part for the additional labor and material required for said extension.

"And, whereas, said board of naval officers, after careful and mature deliberation, did fix the additional compensation to be paid said party of the first part for the said extension of the said dry dock at forty-five thousand five hunded and fifty-six ($45,556) dollars, and did allow an extension of three (3) months' time on account of said extension of said dry dock:

"Now, therefore, the party of the first part does hereby agree to extend the said dry dock to a length of six hundred and seventy (670) feet, measuring from the outer gate sill to the coping at the head of the dock, in the same manner and under the same conditions as though said extension had been included in the original contract.

"And it is further agreed by the party of the first part to accept from the United States, as a just compensation for said work of extension, the sum of forty-five thousand five hundred and fifty-six ($45,556) dollars, in full therefor, payment to be made under the same conditions and requirements as exacted by the original contract.

"And it is further agreed by the party of the second part that, in full and just compensation to the party of the first part, the sum of forty-five thousand five hundred and fifty-six ($45,556) dollars shall be paid for the additional labor and material necessary to extend the said dry dock, as heretofore agreed to, payments to be made under the same conditions and requirements as exacted in the original contract.

"And it is therefore agreed that the time fixed in the original contract for the completion of the said dry dock shall be extended three (3) months, on account of the extra labor necessary to carry out the extension of the said dry dock as called for by this agreement."

The supplemental contract of August 17, 1893, contained the following:

"This agreement, made and concluded this seventeenth day of August, A. D. 1893, by and between John Gillies, of the city of Brooklyn, in the State of New York, party of the first part, and the United States, represented by N. H. Farquhar, U. S. Navy, Chief of the Bureau of Yards and Docks, Navy Department, acting under the direction of the Secretary of the Navy, party of the second part,

"Witnesseth: That whereas it has been deemed desirable to change the location of the dry dock now being constructed at the U. S. Navy Yard at Brooklyn, New York, under contract with the said John Gillies, party of the first part, dated November 17th, A. D. 1892:

"Now, therefore, this agreement witnesseth that in consideration of the premises and for and in consideration of the payment to be made as hereinafter provided for, the party of the first part, for himself, his heirs and assigns, and his legal and personal representatives, agrees to and with the United States that he will, in the construction of the said dry dock, change

its location to one sixty-four (64) feet further inland than that laid down and staked out when the said contract was entered into, and that he will perform all the additional excavation necessary at the entrance of the dry dock in consequence of the said change of location; also all the additional work necessary to lengthen the suction pipes provided to be laid from the present pump house, including the piping, round piles, sheet piles, timber, iron work, excavation and back filling, &c., and all other work incident to said change of location, supplying all the labor and materials therefor.

"And this agreement further witnesseth that the United States, party of the second part, in consideration of the stipulations, agrees that for the faithful performance of this agreement by the party of the first part there shall be paid to the said party of the first part the sum of five thousand and sixty-three dollars and eighteen cents ($5,063.18), United States currency, as full compensation. Said payment to be made in accordance with all the terms and conditions of payments as provided in the said contract and specifications.

"And the United States further agrees that the time limited by the said contract for the completion of the dry dock shall be extended for a period of eight (8) weeks on account of the said change in the position of the dry dock.

"It is also agreed that the provisions and conditions contained in the said contract and the specifications thereto attached, in regard to the character and quality of the materials and workmanship, shall apply to the work as herein modified.

"This agreement is made under the provisions of and in accordance with article 'seventh' of the said contract."

Before addressing ourselves directly to the question before us, it may be well to briefly examine some of the decisions of this court on the subject of the alteration of contracts without the assent of the surety.

Miller v. *Stewart*, (9 Wheat. 680,) was an action on a bond conditioned for the faithful performance of the duties of the office of deputy collector of direct taxes for eight certain townships in the fifth collection district of New Jersey, and it appeared that the instrument of the appointment, referred to in the bond, was afterwards altered, so as to extend to another township, without the consent of the sureties. It was *held* that the surety was discharged from his responsibility for moneys subsequently collected by his principal, the court saying, per Mr. Justice Story: "That the liability of a surety is not to be extended by implication, beyond the terms of his contract; that his undertaking is to receive a strict interpretation, and not to extend beyond the fair scope of its terms; and that the whole series of authorities proceeded upon this ground." *Miller* v. *Steward*, was followed and approved in *Leggett* v. *Humphrey*, (21 How. 76;) *Smith* v. *United States*, (2 Wall. 219.)

In *United States* v. *Bocker*, (21 Wall. 652,) in the case of a distiller's bond, which recited that the person is about to be the distiller at one place, to wit, at the corner of Hudson street and East avenue, situated in the town of Canton, it was held that his sureties were not liable for taxes in

respect of business carried on by him at another place, to wit, at the corner of Hudson and Third streets in the same town, even though he had no distillery whatever at the first named place.

However, the proposition that the obligation of a surety does not extend beyond the terms of his undertaking, and that when this undertaking is to assure the performance of an existing contract, if any change is made in the requirements of such contract in matters of substance without his consent, his liability is extinguished, is so elementary that we need not cite the numerous cases in England and in the State and Federal courts establishing it. Many of these cases will be found cited in the opinion of Thomas, J., in this case. (96 Fed. Rep. 299.)

At the trial in the Circuit Court, it was contended, on behalf of the surety, that this proposition was applicable, and exonerated him by reason of the changes made in the original contract by the supplemental contracts of June 16 and August 17, 1893. It was claimed on behalf of the United States that the changes made in the original contract by the supplemental agreements were within contemplation of that contract, and must be deemed to have been assented to in advance by the surety.

It was held by the learned trial judge, that the government's position was well taken in respect to the supplemental agreement of June 16, 1893, which he regarded as fairly within the meaning of the provisions in the seventh section of the contract, which refers to and provides for changes, alterations or modifications in the plans and specifications, and, therefore, within the undertaking of the surety. But his view was otherwise in respect to the alterations made by the supplemental contract of August 17, which, as respects the change of the site of the dock and the extension of the time of completion of the contract, he held to be changes not within the scope of the seventh section, but to be such as to exonerate the surety from liability for the subsequent dereliction of his principal.

We agree with the Circuit Court of Appeals in thinking that if the learned judge's opinion was sound in respect to the agreement of August 17, 1893, it is not necessary to determine whether the seventh section warranted so wide a departure from the plans and specifications of the original contract as was made by the agreement of June 16, 1893.

Coming, then, to the question of the effect on the responsibility of the surety of the supplemental agreement of August 17, we agree with the Circuit Court and the Circuit Court of Appeals in holding that the alterations thereby caused were beyond the terms of the undertaking of the surety, and extinguished his liability. The seventh section had in view such changes as might be found advantageous or necessary in the plans and specifications. But the changes called for by the new agreement had no reference to the original plans and specifications, but changed the location of the dry dock, requiring the contractor to make additional excava-

tions and connections with the water, at an increased expense, and gave an increased time of performance.

A few cases, illustrating the principles involved, may be properly cited, and reference is made to the opinion of the Circuit Court, in which many more are cited.

In *Mundy* v. *Stevens*, (61 Fed. Rep. 77,) it was held by the Circuit Court of Appeals of the Third Circuit that sureties for the payment by a contractor to a sub-contractor of all moneys received for work under a government contract as provided in the contract were released by an alteration of such agreement whereby the right secured to the original contractors to deduct from the monthly payments three cents per yard for material dredged, subsequently was modified so that payments of two and a half cents per cubic yard should be made monthly; and it was also held that, as the plaintiff had set forth the supplementary agreement in his statement of claim, he thereby made it part of his case, and the burden of proof that the change was consented to by the sureties was upon the plaintiff.

Rowan v. *Sharp's Rifle Man. Co.*, (33 Conn. 1,) is an important case. There it was held by the Supreme Court of Connecticut that where a contract provided that the guns contracted for should be made "with all possible dispatch," and a supplemental contract, made before performance, provided that three hundred guns per week should be delivered for a certain period, and six hundred per week afterwards, the surety was discharged, the court saying: "But it appears to us very clear that a contract to manufacture and deliver a large quantity of any description of goods in a reasonable time, and a contract to manufacture and deliver the same quantity either at a specified time for the whole or a specific quantity from time to time, monthly or weekly, as the case may be, are materially variant."

The Supreme Court of Indiana, in *Zimmerman* v. *Judah*, (13 Ind. 286,) held that a supplementary agreement to put an additional story on a house released the surety for the contractor in the original contract.

Whitcher v. *Hall* (5 B. & C. 269,) is cited in the opinion of the Circuit Court. There it was held by the Court of King's Bench that a surety engaged for another to the plaintiff for the milking of thirty cows, at a given price each per annum, was released by a subsequent agreement without his consent, whereby the hirer was to have twenty-eight cows for one-half the year and thirty-two for the remainder.

A further contention is made in the government's brief that, even if such substantial changes were made in the contract as would release the surety if made without his assent, the fact of such changes should have been set up by the defendant as an affirmative defense by answer or plea, and not by demurrer.

The declaration set out, by attaching them as exhibits, the original and the two supplemental contracts, and it alleged that the changes effected by the latter were made "pursuant to, and in conformity with, paragraph 'seventh' of the first contract." If, upon the face of the agreement of August 17, 1893, it appeared that substantial changes were made in the location of the proposed structure, requiring additional excavations and connections at an increased expense, and extending the time limited by the contract for the completion of the dry dock for a period of eight weeks, on account of the change in the position of the dry dock, and if, as is conceded by this objection, such substantial changes in the location, cost and time necessary for the completion of the work operated to release the surety if made without his knowledge and consent, then the declaration put the plaintiff out of court, so far as the defendant surety was concerned, unless it was averred that the latter had knowledge of the changes and consented thereto. If the government's pleader had evidence of facts showing such knowledge and consent, and was surprised by the action of the trial judge in sustaining the demurrer, it was open to him to ask leave to amend the declaration by adding the necessary averment. This was not done, and we think it is too late to urge this objection in this court.

The judgment of the Circuit Court of Appeals is

Affirmed.

Mr. Justice GRAY took no part in the disposition of this case.

True copy.

Test:

Clerk Supreme Court, U. S.